DELEGATION AND AUTONOMY

ARTHUR W. MACMAHON

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FOREWORD

THE Indian Institute of Public Administration was fortunate to have Prof. Arthur W. Macmahon, Eaton Professor Emeritus of Public Administration, Columbia University, U.S.A., as a Visiting Professor at our School of Public Administration from February to May 1960; and in that capacity he delivered the lectures on "Delegation and Autonomy" which are published in this volume. Although Prof. Macmahon draws mainly on the experience of the U.S.A. in discussing problems of general supervisory relationship, delegation and autonomy in economic regulation and autonomy in the conduct of public enterprises, he brings out succinctly the implications of this experience for India. Prof. Macmahon, I need hardly say, shows a deep understanding of the functioning of institutions and processes in government in the context of delegation and autonomy, and his method of treatment is both analytical and reflective.

The increase in the tempo of planned development in India is throwing up complex problems related to delegation and autonomy in our far-flung Central and State Administrations as well as in the expanding public enterprises. The process of administrative reorganization also raises certain fundamental issues in the matter of organisational form, area and function. I earnestly hope that Prof. Macmahon's lectures will be useful in promoting a better understanding of our problems, in provoking a rethinking of the basic issues and in finding appropriate solutions.

Indian Institute of
Public Administration,
New Delhi, July 15, 1961

V. K. N. MENON
Director

PREFATORY NOTE

I HAVE been honoured by the opportunity to participate in the work of the Indian Institute of Public Administration and the Indian School of Public Administration in New Delhi. I have gained much as a visitor from a country that is still new, although in a sense it is old in the relative maturity of its industrial methods. An American can teach a little, but mostly learn, in an even larger and more diversified country that is so old in human experience, although in another sense it is new amid exigent tasks of developing a balanced economy and completing the building of a nation in an atmosphere of inquiry and discussion.

* * *

The substance of these chapters was presented in a series of lectures to students in the second-year class of the School of Public Administration. During the preceding months I had given thought to the question of autonomy while a visiting member of the Faculty of the University of Istanbul. In developing the lectures in India, a preliminary text of each chapter was mimeographed in advance. I have had the benefit of class discussion and opportunity later to reconsider and to amplify the mimeographed version while still in India, after an interval of travel and interviews.

The theme of these chapters, which look at autonomous forms of organization from several angles, has elements of interest for more than one country. I wish that I were able to give them a more specific application to India. It is from lack of knowledge that so much space is given to illustrations from the United States. Readers will understand the diffidence with which I venture to comment upon Indian governmental institutions.

* * *

These chapters follow a thread of selective interest. It has to do with the uses and limits of certain autonomous elements in modern administration, with emphasis upon economic relations. This guiding thread may sometimes seem to be lost in the fabric,

for we shall draw illustrations from several very different types of governmental activities. Our selective inquiry involves phases of the larger question of decentralization. We are especially concerned with the compatibility between autonomous devices and the integrative ideals of public administration.

I speak of integrative ideals because administration divides work into specialities—the special skills and duties of individuals and of units—in order to enrich a larger whole in which these necessary elements are drawn together. Such is the orientation and impulse of administration's view of its main responsibility. In practice, the synthesis is not complete. This fact is evidenced in the relatively specialized concerns of great ministries even when they partially overcome the separatism of their major divisions and sections. The same fact directs attention to the problem of bringing governmental services together where people live and work. This administrative question merges in the problem of securing widespread initiative and participation. To say these things shows how flexibly we must think about the meaning of administrative integration if we are to understand the ways in which centralization and decentralization can be made to operate as complementary principles.

In the early chapters, taking decentralization as the domain of inquiry, we face some fairly universal problems in reconciling function and area as bases of division and synthesis and in reconciling administrative and technical lines of supervision.

We turn then to the field of economic regulation for our main examples of situations that involve possible conflicts between autonomy and administrative integration. Here we are concerned with public control of private economic activities. The question of judicial review is relevant to the general theme because an independent judiciary is external to and autonomous in its relation to administration. Within administration, autonomous elements may be introduced in the effort to provide substitutes for judicial review. These, too, invite critical attention. It is also relevant to examine the tendency in many places to vest regulatory duties in semi-independent boards.

Finally, the thread of our selective interest in autonomous organization leads to the distinctive problems of structure and relationships that arise when Government enters the market-place directly and undertakes to supply goods or services for a fee or price.

I am deeply indebted to Professor V. K. N. Menon, Director of the Indian Institute of Public Administration, for the opportunity to serve as visiting professor during the second term of 1959-1960. Apart from the inspiration and insights I have gained from him, I have been helped immeasurably by his resourceful sympathy and the contacts he has made possible for me. I am also indebted to the Institute of International Education which, with support from the Ford Foundation, cooperated in arranging for my service. My wife and I have enjoyed and profited from our association with the members of the staff of the Institute of Public Administration and the School, the interviews in various parts of India arranged for us through the Institute's Regional Branches, and the unfailing courtesy and gift for analysis and communication which we have found as national characteristics among the many administrators at several levels with whom we have been privileged to talk.

ARTHUR W. MACMAHON

New Delhi,
June 8, 1960

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CHAPTER I

THE ESSENTIALS OF INTEGRATION

SINCE OUR THEME puts the stress on decentralization, it is appropriate at the outset to concede and emphasize the importance of integration. It is not needed less but more in the public administration of societies with private or mixed economies, which deliberately leave so much scattered, uncoordinated initiative and decision to individuals and groups. Since in such places the influence of government is partial or secondary, it must make the most of what it does by concerting its activities. Accordingly, we must take account of administrative integration from the standpoint of needs and methods. We can best begin a brief survey by speaking of the tasks of modern governments in mixed economies, looking first at the causes and then at the consequences.

I

The tasks of governments today largely reflect modern technology, with its conquest of space (on the ground by rail or road, by water, and in the air); its capacity for instant communication over vast distances; its use of power from sources other than the muscles of men or beasts; and the ability to develop resources through organization, which must be counted among the inventions of mankind. These involve specialization and subdivision of labour in new ways among individuals, occupational groups, and also among localities, regions, and far-distant countries. Subdivision of labour, in turn, leads to increasing interdependence, although often the regrettable kinds of interdependence that are marked by rivalry and conflict or by subordination and submissiveness. The need for coordination of some kind is the imperative corollary when subdivision is attended by interdependence.

The tasks of modern governments also reflect the ideas which, in a dynamic combination, have been at work in the world. These ideas include, first, the importance of individuals because of attributes which are inherent and inalienable, and second, going beyond that, the belief that the good life to which the individual is entitled, and for which he should strive, has in part a physical basis which can and

should be progressively improved by an understanding of the natural world. Admittedly, too often in the western world the short-sighted emphasis has been upon mastery in the relation of man to nature. This outlook accompanied what Prescott Webb has suggestively called "The Great Frontier", during a unique period in history when Metropolitan Europe expanded into nearly empty continents and could utilize the accumulated resources at hand. Today, in sounder mood, men are learning to cooperate with nature and to stress the long-run importance of depending on renewable resources. Both the older and the newer viewpoints interact with the spirit of science, which is curious about every aspect of life. The combined outlook has been accompanied by emphasis upon health, longer life, and essential comforts. This way of looking at things is now enriched as well as sobered by recognizing that health is not of the body only but also of the mind, for which the basis of resilient contentment must be sought through self-fulfilment in positive and responsible attitudes toward social harmony. In these adjustments the solution lies partly in the discipline as well as in the refinement of men's wants. Nevertheless it would be unrealistic and futile, as it would also be inhumane, to deny or to deplore the widespread expectation that there will be an increasing degree of equality and of regularity in the development and the behaviour of the economic processes that supply goods and services. This expectation has to be met (so far as it can be met) in the face of the intricate, delicate, and interdependent nature of modern economic processes, many of which are affected by world-wide conditions.

In free, or approximately free societies, the allocation of resources and the direction given to the people's energies are determined by three main processes.

Tradition is one of these processes. It is more than a mere "cake of custom"; it is more than the habitual wants and ways of life that in part are the residues of ideas and attitudes. It also involves their cultivation and projection. Nevertheless, as a process of allocation and direction, it lacks mobility.

The second process is economic. It is the influence exercised by people as consumers when they prefer to buy certain things and do not buy other things. This control by consumer choice implies the existence of an economy which is capable of the widespread distribution of goods and services for sale in a free market. Private-enterprise economies are based upon the ideal that the allocation of re-

sources and production should be guided by the freely expressed preferences of all the people as consumers. This condition requires that there be opportunity to start businesses and that there be competition among them in seeking to supply what the people are willing to buy. It should be added that some existing socialist regimes (as in Yugoslavia) extol, as a working ideal, the desirability of allocating the use of resources in part and directing production through consumer preferences as revealed in a partially competitive market. Even in the absence of a socialist framework, individual public enterprises are in part guided and their success may be judged in the light of consumer responses.

The political process is the third procedure by which a society allocates resources and determines in part to what matters people's energies will be applied. Modern democratic states seek to decentralize the basis of the political process by giving all adult citizens the right to vote. The process is subject to many local pressures; it faces the risk of factional control. Nevertheless, by its nature and basis, it is more comprehensive than an economic process which is carried on for profit, whether under conditions of vigorous competition or of oligopoly. It is not more sensitive to wants than the economic process; however, it is sensitive in a different manner and responsive to certain needs that would not be recognized otherwise. It is more deliberate and more rational than the economic process in the way in which it presents alternatives for collective choices. These characteristics are the source of many tasks that fall to government. They are tasks that involve government's inherent coordinating role.

The complementary nature of the economic and political processes of choice and direction is receiving an increasing amount of attention from students alike of government and of economics. An outstanding illustration is a recent treatise entitled *Politics, Economics and Welfare*, written jointly by Robert A. Dahl, political scientist and C.E. Lindblom, economist, of Yale University in the United States.

II

I have spoken of the tasks of modern governments in terms of their causes. We pass now to the consequences, as shown in the administrative activities of governments in countries with mixed economies. For purposes of convenient summary, not including defence, we may identify three aspects of the modern state: the regulatory state; the

service state; and the planning and equilibrating state. What men often call the administrative state is a fusion of all the three.

The regulatory state, as we use the phrase here, describes the extension of public activities of a protective or preventive nature. These activities involve certain minimum standards, authorized by law, elaborated by administrative regulations, energized by inspection, advice, warning, and prosecution, and enforced when need be by courts. In addition, the concept of public interest has been extended. Certain fields of private economic activity—sometimes whole segments of the economy—have been identified as sufficiently affected by the public interest to justify a considerable measure of control and guidance by administrative bodies which can make determinations, sometimes through licences and sometimes through directing orders or awards. The purpose of such intervention is partly coordinative, though it must be confessed, as a fault, that up to the present, the coordinative effect of such bodies has been felt mainly within the particular economic segment which is being regulated.

The service state, in the sense in which the words are used here, covers many activities which have led to the governmental employment of large numbers of personnel and the use of much money and materials. In its service role government not merely commands or forbids; it does things itself, if only in giving counsel. The resultant scale and diversity of service activities give rise to some of the major managerial problems of government. Three types of services may be distinguished.

First, welfare services include many functions, some of long standing but mostly recent, in which government at some level supplies free or low-priced services in fields like education, health, culture and recreation, social insurance, unemployment relief, housing, and others.

Second, facilitative services include public works of general utility, as in transportation, communications and power. They also include various stimulative aids of a research and informational nature. Like many of the welfare services, these activities are part of what is sometimes called the "social overhead", which in one way or another must be provided and paid for in any advancing society. They are indispensable to production and distribution although they are separate and not always recognized as a consequence and cost as well as a condition of economic progress.

Third, entrepreneurial services. Here the government may lessen risks by acting indirectly as the insurer or guarantor of certain desired developments; or it may loan funds; or it may invest in or become itself an operator of enterprises. Only when a government is preponderantly involved in the latter type of relationship should we signalize its nature by speaking of the industrial state. All modern governments, in varying degrees, have some of the attributes of the enterpreneurial state.

Finally, the reference to the planning and equilibrating state, as we use the words here, indicates how modern governments (not least in countries whose economies are almost wholly private) must equip themselves to analyze and to readjust the government's various activities in relation to each other and to the changing economic conditions. An indispensable basis for such action is widespread understanding and use of the macroeconomic concepts of national income, savings and consumption going beyond the classical theory of the economics of the individual firm. Within the framework of these concepts, it is essential to have up-to-date statistics in the validity of which everyone has confidence, though they may differ about the inferences to be drawn. In well-developed mixed economies, a comprehensive and flexible fiscal policy is important as a way of increasing the cumulative effect, direct and indirect, of both public and private activities in lessening business fluctuations and in protecting the country's international position in exchange and balance of payments. Such action is not less crucial when the government's role is compensatory and corrective. Even more important, however, is the formulation of goals and the development of programmes which are consistent with each other in working toward what Woodrow Wilson called a "symmetrical national development". In underdeveloped economies, such a programme goes beyond measures that aim at symmetry by attending to needful areas, social groups, or particular economic segments. It calls for an investment policy that involves a view of the society as a whole and the development of all its resources including the improvement of human skills.

III

We proceed now to the means by which integration is accomplished. It will be seen that, despite the importance that modern thought attaches to the attributes described as the planning and equilibrating state, administrative integration has tended thus far to work within

functions, rather than between them. Where different levels exist, notably in federal systems, the inter-governmental bridges that are most easily erected are almost wholly functional. Within each function, the integrative pull is toward the centre.

The fact that these trends are natural as well as strong does not mean that they should not be supplemented and in part redirected. The needed correctives are a challenge to inventiveness. They involve difficult structural questions in the relation of function to area. They involve the inveterate question of relating thought to action through an effective connection between the planning mechanism and the organs of decision and action. The possibilities in these directions do not lessen the need for attention to the means of administrative integration which are already familiar. It is enough to mention four for brief comment: a system of ministries or departments manned by administrators of wide grasp; the use of staff; horizontal coordinating relationships, formal and informal; and provisions for the reconsideration of certain proposed actions at higher levels in the light of a broader range of factors.

Use of Ministries or Departments

First, as to the use of ministries or departments, integration requires, not only a main centre of executive decision in the person of a Prime Minister or President, depending on the constitutional structure of the country, but also subsidiary centres of decision and advice around which offices are grouped for purposes of direction, coordination in performing related tasks, and economy in the provision of facilities used in common. Ministries may vary in the degree to which they are decentralized internally. This decentralization shows itself in the relation of the Minister and his immediate associates to the work of the main divisions, the finality of discretion allowed to their heads, and the leeway entrusted to field headquarters.

Deeper than structure, the integrative possibilities lie in the existence at several levels of administrators to whom scope can be given. Their role in this regard is seen in the following description of an ideal type; it is drawn from observation of successful individuals. Executives stand between ends and means. They are able to see the end in terms of the means necessary to achieve it; they see how a big job can be broken down into parts or processes which can be defined and assigned. This awareness is essential in the art of building and maintaining an organization. Executives are not jealous about the

work itself; they do not become involved in details although they understand them. They do not object when subordinates vary the methods by which they carry out their assignments, provided the means are legitimate and the desired result is obtained. At the same time, executives always convey the sense to their associates and subordinates that no assignment which has been given is forgotten. Therefore, executives possess a good memory, personal or institutional. It is the basis of a quiet pressure for results. It also prevents the executive from making inconsistent assignments or commitments. Executives are adept at communication. They are able to state clearly what they wish to have done. Executives get most of their results by persuasion rather than command. Especially they succeed by making everyone who is concerned understand the purpose for which the organization exists, how his work fits in, and the relation of the agency to other parts of the government. Communication includes the encouragement of and opportunity for an upward flow of suggestions, the accessibility of the executive, his circulation among fellow-executives, and a reciprocal sympathy with their problems. Executives are natively decisive, able to take risks when necessary but, precisely because they have and are conscious of this quality, they can be deliberate and refuse their approval if all of the relevant factors have not been considered in a proposed action or request. This last quality is a phase of the executive's awareness of the interests that are likely to be affected by the proposed action and how conflicting claims can be harmonized consistently with the executive's duty under the law. It is such breadth of view—such a sense of relevance—that marks an able executive. It enables him to make his contribution to the integrative process.

In the light of these needful qualities, I am aware of the strong case for bodies of generalists like the Indian Administrative Service. In a later chapter I shall note, as an additional advantage, the part that this particular service plays in India's type of federal administration. In contrast, perhaps, as an American I am too complacent about the faults and too optimistic about the advantages and possibilities of a different sort of personnel system in which the positions of administrative command are more fully open to all the talents. This hopeful outlook, to be sure, assumes that, amid more specialized recruiting streams, there is an adequate intake of well-educated young people whose interests are broad, who are used early on substantive work, and who through the years, are allowed to make their way upward

by proving themselves in comparison with all other elements in the public service. It also assumes that means will be perfected to identify, develop, and use in a flexible, government-wide manner those who, regardless of their initial conditions of entry, have shown marked administrative capabilities.

Without arguing the matter further, at least it may be said for most countries that the remark of Arthur H.M. Hillis, writing in the *Public Administration Review* for the summer of 1951, is increasingly applicable. Against the background of earlier conditions in the British civil service, he observed that "the contemporary official has a much more difficult course to steer between the Scylla of an ineffectual amateurism and the Charybdis of a narrow specialization; more than ever he urgently needs to cultivate the broad outlook, but more and more he finds it necessary, if not to be a technical expert, at any rate to be able to talk to experts in their own language and to reach an intelligent and informed decision involving a wide range of technical points."

Staff Agencies

Second, staff agencies are an indispensable supplement to a system of ministries and a descending hierarchy of subdivisions. The proper provision of staff extends the competence of the executive at each level without interfering with the authoritative flow of command. Staff agencies are of different types from the standpoint of their relation to political programmes and policy decisions. Some staff services handle important but essentially facilitative matters such as personnel recruitment, material, and accounting. Some staff agencies are engaged in crucial advisory duties, variously called "general staff work" or "programme staff work". They assemble information and prepare for executive decisions that may affect major choices of policy. These matters include budgetary decisions. Other staff agencies fall between the main types that have been indicated. Thus, the units that make suggestions for the improvement of "organization and methods" (to use the current phrase) are an intermediate type. They can bring detached thinking, together with insight which is aided by comparisons, to bear on existing routines or the organization of new programmes. Also of the intermediate sort are some staff units for public relations. They stand close to policy decisions which they seek to explain within the government and to the public. They sometimes help to make policy when they assist ministers and

others in the preparation of speeches and other public statements. A third intermediate type of staff are legal advisers attached to various parts of the government.

"Staff" and "line" responsibilities, so called, are different. They must be clearly distinguished. Nevertheless, it should be noted that the same officer or agency may sometimes be in a "staff" and sometimes in a "line" relationship to given pieces of work, depending on the location of the main responsibility for action, that is, the "line" responsibility. The need for flexibility in applying the concept of staff is not the only reason for caution in using this invaluable administrative invention. A prime purpose of staff is to increase the executive's resources by facilitating his access to them. His resources for advice as well as action lie largely within the line agencies that are subject to his command. An overuse of personal staff aids, accompanied by undue dependence upon them, may isolate the executive from these resources and result in impoverishing him.

Horizontal Coordinating Liaison

Third, as to horizontal coordinating liaison, the working relations run across from ministry to ministry. They may involve many parts of the government in dealing with a single problem. When the question is recurrent, it may justify the formal establishment of an inter-agency committee. In these circumstances despite cynicism about committees, the device is likely to be economical. Moreover, it has the advantage of ensuring that the agencies which are identified as having a concern in the matter will be notified and have a chance to be heard. When inter-agency committees are created, however, means should exist to keep in touch with their work and to make sure that they are abolished when the work is done. An instructive example has been the way in which the British Cabinet Secretariat attempts to keep watch over the inter-departmental committees.

Most of the needs of inter-agency liaison are best handled informally, as in day-to-day dealings over the telephone between "opposite numbers" (that is, persons, in comparable positions) in different agencies. Even so, the personal element should not destroy the responsibility which is an inherent virtue of formal organization. Thus, "opposite numbers" may be friends, but they should not work together *because* they are friends; they should become friends because their positions, and the common interests of their agencies, require them to work together in getting things done.

Reconsideration of Actions at Higher Level

Fourth, as to the reconsideration of certain proposed actions at higher levels, such administrative review is indispensable in connection with many matters. It must be applied with restraint. Otherwise the successive initialing of papers, or the writing of minutes, results in delay, even paralysis, while it destroys self-reliance and a full sense of responsibility on the part of those who make the primary decisions. We may generalize about this problem by saying (as the wise former administrator, Paul H. Appleby, has emphasized in his writings): the reconsideration of proposed actions, when required at a higher level, should be to take account of some different and broader factors which officers at the lower level could not be expected to know. Thus it is not to do their thinking over again; it is to do a different kind of thinking. To say this is to express a spirit, not a procedure, for the procedures will vary and many of them will remain unwritten; but as a pervasive attitude toward responsibility, this spirit is of the essence of resilient administration. Such attitudes are not inconsistent with the integrative essentials in government's coordinating role.

IV

Delicate problems in the combination of elements must be solved in relating a democratic nation's planning mechanism to the country's political process and to its regular system of administrative departments and agencies. The main planning organ must be sufficiently detached to permit an overall, long run, articulated view. At the same time it must be organically related to action without superseding the procedures of politically responsible government.

In the United States the Council of Economic Advisers is in the Executive Office of the President; its three members are his personal choice. The emphasis is upon economic analysis and advice, including advice to leaders of business and labour in the private sector. A Congressional Joint Economic Committee, equipped with a small staff, not only receives and comments on the annual reports of the Council, but also participates in the processes of analysis and advice through hearings, studies, and public statements. The strategies of indirect influences upon the economy, especially for countercyclical purposes and through monetary and fiscal measures, are outstanding in American thinking about the government's equilibrating role. Nevertheless, the Federal Reserve Board is ostensibly

independent and equipped with its own expert staff, although it shares in the overall analysis of economic conditions and trends. No occasion has arisen since the passage of the Employment Act, and the establishment of the Council of Economic Advisers in 1947, to test fully how the separate, potential influences at the government's disposal could be used concertedly in the face of a critical condition in the American economy. Much lies within the reach of the President but even more would depend upon the response of Congress. Admitting these things, it can be said that the acknowledgement of the people's expectations and the affirmation of the government's responsibilities which were made in the Employment Act mark that measure as a landmark in the public policy of the United States.

In countries that have economic councils based upon a representation of interest, their ability to serve as planning organs is inherently limited by their composition and the fact that they would rival the parliamentary body and short-circuit the electoral process itself if they were strong. Their constructive role lies in two directions: in the technical improvement of existing and proposed measures, on the one side; and, on the other, in sometimes helping to create agreement among the competing interests in the society. The importance of even a modest contribution in the latter respect is far from negligible. The potentialities of the device have been illustrated in the Netherlands since the Second World War. The work of the Economic and Social Council interlocks in matters of labour policy with the harmonizing efforts of a joint body of representatives of employers and workers who have met regularly to discuss the relation of these interests. It should be added that the country's planning bureau is a fully official unit. It has shown skill in presenting those in power with detailed statistical analyses of alternative policies in terms of their probable consequences, singly and in combination.

India's planning mechanism is an outstanding example of a successful attempt to combine the virtues of detachment and breadth with the virtues of an organic relationship to action. The Planning Commission is sometimes charged with virtual usurpation of the Cabinet's role and a benevolent subversion of the political process itself. I cannot regard the charge as fair. In addition to the participation of the Prime Minister and the Finance Minister as members of the Commission, its prime decisions must be confirmed by the Cabinet and major policies depend upon Parliament. Moreover, the planning process is recurrent since the goals are reached progressively by an-

nual budgetary actions. I shall return to this matter in later pages where I shall comment on state participation in planning as an aspect of India's federal system. Altogether, the machinery seems well suited to a planning process which, during an active period of national development, relies heavily upon the leverages of central investment, supplemented by foreign exchange controls and the licensing of private undertakings. What remains to be perfected and refined are the statistical services and their use as an empirical basis for action.

It is happy circumstance, I think, that in our time both matured industrial societies, on the one hand, and developing societies, on the other, have equal need for macroeconomics, as distinguished from the older economics that centred upon the individual firm in a competitive situation. The concepts of macroeconomics are the essence of planning; the data that give them solidity are the indispensable foundations. The popular understanding of these concepts and the confidence in the reliability of the data that guide their application in public and private decisions, are among the most important conditions of concord and progress in free societies.

CHAPTER II

PATTERNS OF DECENTRALIZATION

My purpose in these chapters is to examine the uses and limitations of certain forms of Delegation and Autonomy. The foil of the critique is properly a recognition of government's coordinating role and the need for administrative integration that it implies. Accordingly I paused at the threshold to acknowledge these integrative needs and tendencies before entering upon our main theme.

Here it is appropriate to identify the main types of decentralization as further background for the study of certain special situations and relationships that are relevant to our selective interest. This chapter, therefore, proceeds in the manner of a formal classification which unfortunately slights the crucial human factors and blurs the importance of many variants within the main patterns.

I

It is impossible to standardize the usage of the word decentralization by seeking to give it meanings that would be acceptable universally. The English language took the word from Latin; it shares it with the Romance languages. The word, therefore, is used under many different constitutional systems and in different social environments. Moreover, it is a word that is not confined to public affairs and to formal organization in government or business. It is used in every walk of life. It must be accepted as a word of innumerable applications. Through all of them, however, runs a common idea, which is inherent in the word's Latin roots, meaning "away from the centre". This general meaning must be supplemented in each use of the word by qualifying definitions that are supplied for the occasion by the person who employs it.

A number of other terms (also of Latin origin in the English and Romance languages) have related meanings. They may be helpful in differentiating the types of decentralization. These words include "devolution", "deconcentration", and "delegation". None of them has a fixed meaning in the literature of political science. Each must be defined in the context in which it is used. My personal preference is to employ the word "decentralization" as the most loosely

inclusive of all these terms. "Delegation", although almost as broad, points to relations in which powers are formally conferred under law, as by the constitution itself, or by the legislative body to an executive agency, or by an administrator to a subordinate, or from one level of government to another.

II

Before we seek to classify the types of decentralization, it is fitting to note that the conflicts which may attend the use of different types often involve perplexities of adjustment as troublesome as those that arise between the rival claims of centralization and decentralization. When decentralization is pursued vertically, as from a higher to a lower echelon, the need to transmit technical guidance as well as general administrative orders, or to receive suggestions from below on both kinds of matters, results almost inevitably in multiple channels for the flow of instructions. Strains of a different though related nature appear in situations where the essence of decentralization is horizontal such as exists in a local fusion of programmes. The adjustment of these diverse tendencies is not easy; they are all legitimate; nor is anything gained in their mutual accommodation by denying that they are in opposition. The theoretical study of the different types finds its chief utility in making persons who operate in such mixed settings more sensitive to the fact that the objectives must usually be sought through a combination of structural arrangements.

It is helpful in this connection to ask a preliminary question about the purposes of decentralization. What virtues are attributed to it? Two contrasting sets of values can be identified.

On the one side, the values in view aim at the improvement of central initiative and impetus. Such improvement is sought by freeing those who are at the centre from bothersome details so that they think more effectively. At the same time, it seeks to enable subordinates in charge at lower administrative levels to adapt their methods to the situations at hand. By the very fact of this leeway, it hopes more fully to enlist their interest and energy. All of this may be done in the name of centralized leadership. Incidentally, to be sure, the adaptation of orders in the light of varying conditions tends to merge in methods of consultation and cooperation which have some of the qualities of an essentially different set of objectives. These other objectives stress the diffusion of initiative, proceeding from the needs of people when these are sufficiently felt to manifest them-

selves as wants and are sufficiently rationalized to appear as proposals or at least as questions put concretely for solution.

The two sets of decentralizing objectives are not irreconcilable. The lessons of experience are mostly learned episodically; they come from situations that have evoked an imaginative response; that is to say, they are apt to be local in origin. But the experience comes to fruition when the lessons thus learned are reflected upon, refined, extended by comparison, and taught widely. A central administrative apparatus is not inconsistent with the spirit of decentralization when it performs those roles. An equilibrium between the contrasting sets of objectives is not easily attained, let alone maintained through the years.

Part of the difficulty lies in the riddle of leadership. Whence come the animating ideas of a society? And, so far as government is the channel if not the prime source, where does administration belong, as a creative and not merely instrumental factor, in relation to the machinery of public discussion, politics, and legislative action? It is only a partial answer to say that policies arise from deep-lying ideas which had their source in germinal minds and which interact with changing situations when contemporary leaders are at hand to adapt and apply them. A responsible Government implies the existence of what may be called a "differentiated continuum" of policy-making. Thus the differentiation of politics and administration is an important distinction to maintain as a working constitutional ideal. Within the differentiated continuum, however, administration performs a role that is more than instrumental. It is creative in its own right and not the least at central points of clearance where there is a fusion of ideas and experience drawn from many sources.

III

The types of decentralization, viewed structurally, result from the interplay of two factors. These factors are the nature of the basis of division and the source of power.

The Nature of the Basis of Division

As to the basis of division, two main alternatives exist: territorial and non-territorial. The latter is functional in a loose sense of that word and thus is contrasted broadly with division by areas. However, there are several non-territorial alternatives. The basis may be the nature of the work, which usually can be described as a composite

purpose ; or the distinction may be on the basis of a technique common to many purposes (for example, engineering when it is the organizing principle of a department of public works which builds but does not operate the facilities that it constructs); or the basis may be a group of people who are dealt with as an entity regardless of where they live and perhaps for combined purposes of different kinds. Conventional theorizing about organization is doubtless sound in preferring the first of these alternatives, when the basis of division is not territorial. Nevertheless, special circumstances often point to the desirability of one of the other alternatives : that is, non-territorial organization on the basis of technique or of groups. This fact is consistent with the underlying truth that the choice among forms of organization should be determined by the nature of the task to be performed, the objectives that infuse it, the stage of development at which it is undertaken, and the need that may exist at the time for a distinctive focus of attention. To illustrate: at a certain stage in a country's corrective efforts to achieve a more balanced development, it may be appropriate to create an administrative unit for the specific objective of attending to the needs of small business. In these terms we may justify the recent establishment of such an agency as a separate department in the United States, although it is contrary to the general canon which warns us that, in Lord Haldane's words, organization for groups is likely to result in Lilliputian administration. India affords analogous examples of special structures which, dubious though they are from the standpoint of conventional theory, may be defensible in the setting of time and place.

The two main bases of division—territorial and non-territorial —must ordinarily be used together, except in organizing villages and small cities where a wholly functional breakdown may be sufficient. The two bases involve criss-crossing planes of division. Success lies in recognizing the elements in a well-understood way, both in the initial organizational plan and in its daily operation.

The Source of Power

We turn to the second main variant—the source and location of power —which interacts with the nature of the basis of division to yield different types of decentralization. From the standpoint of power, two chief alternatives exist. Each part (regardless of the basis of division on which it is formed) may be controlled wholly from the centre or it may have some power of self-direction. In modern

governments, such self-direction is ordinarily secured through the election of officials in contrast to their central appointment. When I say this, I do not allow my personal scepticism to rule out the possibility of choosing bodies like the Indian panchayats by some method of local consensus without a formal election. In the case of entities of a non-territorial character, like an association or a university, the basis of self-direction lies in the internal methods by which their leadership is recruited, matured, and supported.

We have identified two logical alternatives: decentralized relationships in which all important decisive power emanates from the centre; and relationships in which the power is to some extent decentralized. In practice, the first type of situation may approximate the second, to the extent that real discretion is conferred upon the agents of the central power. This fact does not lessen the importance of the distinction between the structural alternatives.

From the other side, it is crucial to note that the realities of self-direction in any pattern of decentralization, depend upon more than the formal possession by the parts of the right to act in response to decentralized sources of power. Their realization in practice is contingent upon further conditions, including, first, attitudes and habits which incline men to assume responsibility and to avail themselves of the powers which they possess, and, second, the availability of some financial or other resources and the will to use them. These aspects of the matter point to what is virtually another dimension in the problem of decentralization.

A difficult question of priority arises in connection with the sequence of power and responsibility. It was well said by the late Mr. Justice Brandeis of the United States Supreme Court: "Responsibility is the great developer of men." In the sequence, does power come first? So far as experience is the teacher, the answer seems to be yes. It is also true that individuals and institutions, including levels of government, must contrive to remain energetic when responsibility is shared; single it seldom can be. So far as one can see ahead, both in well-developed and in under-developed economies, it seems inevitable that, in combining ideals, desires, skills and resources, the support must come in part from the tax pools, earnings, and borrowing power of the larger and more inclusive units of government. The fatal attitude that benumbs local initiative is to assume that local self-support is a matter of all or nothing.

IV

We have said that the types of decentralization result from the interplay of two factors: the basis of division (which may be territorial or non-territorial) and the source of power (which may be derived from the centre or be attended by some degree of self-direction). Three resulting patterns may be identified in terms of their legal status. As a convenient description I call them "constitutional devolution", "statutory devolution", and "administrative deconcentration". Some variations that are virtually separate types will be noted as we examine each of these three main forms.

Constitutional Devolution

The term constitutional devolution covers federalism in its many applications. It describes a situation in which power is divided between a central government and constituent units of self-government under an arrangement (the constitution) which cannot be altered by the ordinary law-making procedure. The basis of division is usually territorial. Nevertheless, the federal principle may be applied among non-territorial entities. We shall deal later with the way in which territorial federalism affects the adjustment of function and area.

Statutory Devolution

The term statutory devolution covers two sorts of arrangements: those in which the delegation is to territorial units and those in which the units are non-territorial but possess a degree of self-direction.

Territorial statutory devolution, as the phrase is used here, describes the legal nature of self-government as it is carried on in unitary states through the election of officials in provinces, municipalities, and other geographically delimited units to which power is delegated to legislate and to act otherwise on certain matters. The existence of these units and the extent of their powers depend upon laws enacted by the central legislative body. It can change the areas, the powers conferred, and the structure by which they are exercised. However, the existence in a country of a strong tradition of territorial self-government may become a quasi-federal guarantee that the local units will not be abolished or deprived of substantial powers. The quasi-federal feature is made express in some constitutions which mention the existence of certain territorial governments while leaving it to the central legislature to say what powers and organization they shall

have. The quasi-federal element is carried a step further in about half of the states of the United States through the device called constitutional home rule for cities. In these cases, the state constitutions provide that city electorates may draw up and adopt charters for their government, creating whatever structure is desired, and assuming such powers as do not trench upon matters of state-wide concern. The post-war constitution of Italy illustrates another quasi-federal type of provision. It refers to the possibilty and desirability of strong regional governments in at least parts of the country; it implies that the central government shall create them; but (as events have shown) these provisions do not guarantee that the intention and permission to establish and develop such regional governments will be fully used.

A phase of territorial statutory devolution may be particularized under the name inter-level statutory devolution. The phrase describes the familiar relationships that exist when the purposes of one level of government are carried out in part by self-governing units at a more local level. In unitary governments (which include the states in federal systems like India and the United States), the responsibility may be imposed and enforced as a duty, although effective control is not always easy in the absence of the power of appointment. In the case of federal states, it should be noted that, apart from judicial relations, the assumption by the states of responsibility to act as agents of the central government is essentially a voluntary matter in systems which (like those of the United States, Canada, Australia, and Latin America) have traditionally been characterized by direct federal administration. This situation stands in contrast to the greater prevalence of indirect federal administration in the federal constitutions of the European continent and elsewhere, which expressly provide for the obligatory participation of the constituent units as agents of the central government. We shall return to this question in later chapters where we shall note the intermediate position of India's federal system in these matters.

Territorial statutory devolution may appear in the form of units for special purposes, whether a single objective or a combination of objectives. In the United States, the latter possibility has been notably illustrated in the Tennessee Valley Authority. Although designated as a public corporation in the law which created it, the development of the Authority has been financed mostly by annual congressional appropriations. It may be described, therefore, as a

collegial-headed, special department of the national government, assigned to a particular although not exactly delimited area—a river basin—for the mingled purposes of flood control, the improvement of navigation, the production and distribution of electric power, and the general enhancement of living standards in the valley, as well as an indirect contribution through these to the country's economic strength. The Authority, said the law, was created " for the general purpose of fostering an orderly and proper physical, economic and social development " in all the areas touched by the Tennessee River and its tributaries. The particular design of the Tennessee Valley Authority has not been applied elsewhere in the United States, although its policies and practices have had far-reaching indirect influence, both in the United States and elsewhere. In India, for example, the Damodar Valley Corporation embodies the idea of a multi-purpose organization. In the other river basins in the United States, the area was too big, as in the case of the Missouri River, and the functional activities of the separate agencies were too far developed and entrenched to permit the injection of a valley authority. Coordination, therefore, takes the loose form of inter-agency advisory councils which seek to harmonize the programmes of the various national and state departments within each of the important river basins.

Under the state laws in the United States, special districts (as they are called) are legion. They exist for water supply, sewerage disposal, fire protection, and many other purposes. Partly, their formation is authorized by law in order to by-pass and thus to overcome the territorial inadequacies of existing political units without resorting to any fundamental reconstruction of local government. Since the special districts as exemplified in the United States are likely to be confined to particular purposes, they are not integrative in their effect; indeed, their multiplication is often viewed doubtfully because of the fear that it may undermine the political responsibility and coordinating purpose which are represented in the general units of local self-government. Like tendencies may be traced in most countries, with comparable risks and a similar challenge to think constructively about the future of local institutions in point of adequate territorial scope and comprehensive powers. The effort is all the more important because, at the best, a considerable amount of *ad hoc* organization will be unavoidable.

In an increasing number of cases in the United States, the formation of special districts has been authorized by state laws in order

to cooperate with particular national programmes. Such is the purpose, for example, of the longstanding device of irrigation districts which exist as intermediaries between individual farmers and national reclamation projects. A more recent example has been the widespread formation of soil conservation districts. The state laws which authorize these and other special districts are permissive in character. The flexibility of this organizational tendency, both in point of structure and control, and also the areas involved, has been illustrated in the system of farm electrification cooperatives. Under state laws, they have spread widely since 1935, in order to take advantage of a scheme of long-term loans which are provided by the national government for the construction of local electricity lines, and more recently, local telephone systems. Another example has been the formation under permissive state laws of municipal housing authorities to participate in the system of national loans and grants (and of state support in some cases) for low-cost housing, slum clearance and urban redevelopment. The involvement of such undertakings in a city's planning process and its social programmes is so close, however, that the independence of the housing authorities must yield to these larger considerations.

A more horizontal sort of areal development is the formation of special territorial organizations by agreements between existing governmental units. This tendency sometimes goes no further than a haphazard tissue of contractual understanding among local governments, entered into as a matter of mutual convenience in connection with services like fire protection and water supply. Between states in a federal system, some common problems can be met, or at least alleviated, by inter-state compacts or agreements. Under the United States Constitution, for example, formal compacts require the consent of Congress. Such compacts may create bodies which operate within a defined area in two or more states, under a form of statutory devolution that combines national and state auspices. The possibility of creating a continuing administrative body through inter-state compact has been outstandingly illustrated in the record of the Port of New York Authority, formed in 1921 by a compact between New York and New Jersey. It was frustrated in the early intention and hope that it might rationalize railroad service in the port area, in the face of the competitive ambitions of the several railway systems. The Authority reoriented its objectives, however, and, in line with a relative shift to road transport, became in time a brilliantly successful,

self-financing, somewhat egocentric builder and operator of fee-charging tunnels, bridges, airports, motor-truck and bus terminals, and like facilities.

So far as inter-state compacts have been used in the United States for the handling of rivers, the agreements in the past were mostly confined to mutual guarantees among the states involved about the inter-state division of water for irrigation and other purposes. The primary objective was to assure an adequate stream flow in the lower reaches of the rivers. Such compacts did not create important administrative entities to operate in their own right. But to say this is a judgment on the past; it does not foreclose emergent possibilities in the devolutionary uses of the compact device.

In facing the world-wide problem of what is often called "the exploding metropolis"—the growth and overflow of great cities beyond their established boundaries while they decay at the centre—a major issue is whether the solution must continue to be sought along functional lines in new areal units for particular purposes, notably transportation, or whether the unit of general government should be expanded, and, if so, what kind of responsible political basis can be provided for such an urban complex.

I pass here from the foregoing territorial issues to the forms of non-territorial statutory devolution. The phrase covers a wide variety of situations in which public responsibilities are entrusted by law to non-territorial entities which have a considerable amount of self-direction. Such bodies may be created wholly under public law, by special enactments or otherwise, or they may exist in part under the general provisions of private law, which are borrowed for the purpose. A variant form—increasingly used in many places—is the arrangement by contract with outside private or semi-public bodies for the performance of research or managerial tasks.

Two different sets of motives have prompted the quest for forms of organization that permit a large degree of self-direction. On the economic side, they are intended to permit entrepreneurial flexibility. In matters of the mind and spirit—as in higher education generally or in cultural and informational activities like public broadcasting in certain countries—they are intended to provide an unusual degree of detachment from the political process. The question for our later attention poses a double issue. On the one hand, it involves the practicability of any structural arrangement, apart from conventions of self-restraint, which can guarantee such insulation from the political

organs of government. On the other hand, it is the question of the extent to which such separation is desirable, so far as it is practicable.

Administrative Deconcentration

We come finally in this preliminary survey to the forms of decentralization that I describe as administrative deconcentration. The phrase is intended to cover the varied situations in which ministries, departments or other agencies, at whatever level of self-government, vest considerable discretion in sub-units within themselves, which they control by the power of appointment and removal. These sub-units are formed partly on a functional and partly on a territorial basis.

The degree of internal deconcentration of ministries is an important and far-reaching question. Thus, it is sometimes argued that, if the regular ministries are properly organized, they content themselves with broad guidance at the top and give so much freedom of action to the intraministerial entities that it removes the reasons for seeking to invent special autonomous forms of administration for particular purposes. We shall address ourselves to this argument in a later chapter.

For the present, it is enough to suggest an American view of the relationship between central departmental leadership and the main functional divisions, usually called bureaus. Historically, the view to which I refer has developed in the face of, and partly to correct, the strongly centrifugal tendencies within the big departments. The administrative theory which is implicit in this view is seeking to combine two principles. The first principle is the belief that, when powers are conferred by law, so far as they are not vested in the President (or an elected Governor, in the case of the states) for appropriate assignment, they should be vested in the head of a department. He can then delegate the duties to existing units within the department or, if necessary, create a new unit for the purpose. This procedure ensures flexibility as well as control. The second principle was well-stated a few years ago by an officer in the United States Bureau of the Budget, who was then in charge of studies of organization and methods throughout the national government. He wrote: "We have learned here in the course of our work that operating bureaus should be made as self-sufficient as possible, with a minimum of transaction review by staff officers attached to the head of the agency. We have pressed for less review of transactions at the top of a department, and more emphasis upon staff there who are concerned with

broad policy and who can, accordingly, facilitate the development of policy and its interpretation to the operating officials." I believe that the Secretariats in Indian administration at both Centre and state levels are suited to conduct themselves in this spirit although, in truth, the observer is sometimes oppressed by the sight of high-piled folders in the side offices and the amount of routine initialing of papers by high officials.

Effective deconcentration involves a reciprocal relation of superior and subordinates, with a constant challenge to the exercise of thought and judgment that a sound administrative system seeks to make instinctive among subordinates. In this relationship and in this diffused capacity for initiative lies the basis of wholesome deconcentration within ministries. Indeed, similar traits of behaviour are at the bottom of most viable forms of decentralization. I venture to cite an example of one phase of the reciprocity I have in mind. It concerns a notable English civil servant, Sir Robert Morant, at the time he became the career head of the reorganized Ministry of Health in 1920, after a record of creative leadership in the Ministry of Education. A former associate, V. Markham, has recounted a revealing incident in a book on *Hospitals and the State*, recently published by the Acton Trust. "With the new, or newly named, department," she recalled, "came that greatest of all civil servants, Sir Robert Morant. If ever one had believed that people in high places made little difference to the rank and file of the office, a few days with Sir Robert in control would make one change one's mind. If I had not experienced it, I should never have understood how one man could galvanize a whole vast department into life. At any moment one might be rung up and find it was the Secretary himself. I remember the first time. 'Come down, will you? I want you to tell me about the Birmingham scheme.' And then question after question—'What do you think about this and this?' Shamefacedly, I had to admit, more than once, that I had not thought that about. To his, 'Why not?' I fear I replied, 'I haven't been asked to think since I came here', and he clinched it by saying, 'Well, you'll think from now on.'"

The territorial deconcentration of departments in so-called field organizations is an almost universal necessity. In the United States for example, it is not unusual to find that nine out of ten of the members of a national civil service are stationed in the field. However, this quantitative aspect is not the crucial factor in decentralization. The key question is the extent to which the field officers are allowed to

make decisions. This situation affects the possibilities of a working concert among the field representatives of different agencies. More fundamentally, it involves the larger question of the adjustment of function and area, to which I pass in the following chapter.

CHAPTER III

THE ADJUSTMENT OF FUNCTION AND AREA

WE MAY NOW begin to look more closely at the problems that attend the interaction of function and area. In a fundamental sense, these issues are a phase of the more universal problem of adjusting the special and the general elements in the management of human affairs. Each function is special in comparison with the total purposes of the government. Furthermore, each function within itself contains specialities which enrich it when they are properly combined. Thus highway construction is a function. Within it, are many specialities, such as design, land acquisition, bridge building, research about the nature of the best surfacing materials, and other matters. All of them require more or less specialized personnel; all of them involve knowledge and subsidiary decisions that must be brought together in the actual construction of a highway.

I

The introduction of areal divisions in this complex brings a further complication. Within itself, an area is by nature a synthesizing force; at the least, it invites this tendency. This tendency is likely to be stronger when the people of each area are to some extent self-governing in the double sense that they have power and the initiative to use it. Regardless of self-government, however, a problem of adjustment exists when a number of special functions are carried on in each area. The problem is acute when each function is also a technique that requires or is stimulated by some outside technical guidance and support. When at the same time the area is supervised in the totality of its operations by an officer or organ within a more inclusive area, two types of guidance are involved: one being relatively general in aiming at responsibility for a total composite result through the combination of special programmes; the other seeking to stimulate and guide the particular activities, each of which has its distinctive technical ingredients. The inevitable result is the practice of dual supervision.

The term "dual supervision" is inadequate but suggestive. The relationships are dual in the sense that they involve two types of influence. One is general in scope and integrative in its impulse; it is

often called administrative supervision, in contrast to the other type, which may be called technical supervision.

Nothing is gained by pretending, in the name of clarity of command, that both of these types of influence are not supervisory in nature. Of course, if one wishes, he can say that only a "staff" relationship exists even when the special or technical unit at one level deals directly with the corresponding unit at the other level. It is true that a distinction must be drawn between the types of influence as to their ultimate authority when certain elements of responsibility are involved. In both cases, however, there is supervision.

On the one hand, unless adequate channels exist for the special objectives and the intent, knowledge, and skills that they involve, the total result is impoverished. On the other hand, unless there are means for attending to the relationships and measuring and insisting upon a total performance, it is difficult to achieve a full realization of the objectives in terms of a composite responsibility.

The foregoing points are fundamental as well as nearly self-evident. I confess that they became sharply evident to me and I began to generalize about them as aspects of a nearly universal problem, when I was making a case study of the so-called work relief programme in the United States between 1935 and 1939. In 1935, many millions of people were still unemployed as the result of the great depression that had begun in 1929. It was decided by the President and his advisers and supported by Congress through the largest single appropriation thus far made in peace time, that, in addition to other emergency relief measures, a programme should be launched to provide jobs promptly at a living wage for at least three million unemployed persons. It was hoped that this massive, speedy re-employment would not only relieve their plight in a more dignified and useful way than payments without work, but also start a circulation of purchasing power that might help to galvanize the whole economy. The work projects were to be sponsored, so far as possible, by state and local units of government, which normally were to contribute one-fifth of the cost. A wide and balanced diversity of project was essential to the objective. It sought to arrest what was sometimes called "the erosion of skills" in a period of unemployment. In the context of American society, it was perhaps less desirable than in certain other places to give everyone an experience in manual work, although it should be added that an emergency agency called the Civilian Conservation Corps had already been formed to assemble unemployed

young people in camps to work on re-forestation, the building of recreation and other facilities in national and state parks, trail clearing, and other outdoor tasks. The new work relief programme, though based on the assumption that the bulk of the projects would involve simple construction and would mostly require relatively unskilled manual labour, was intended to provide emergency job opportunities for many types of non-manual workers, preferably on things that would utilize their existing skills: as musicians, for example, giving public orchestral performances ; as artists in painting murals in school houses ; as writers or editors in preparing a series of guide books about all parts of the country ; as clerical workers in copying and reorganizing the archives of local governments, and the like. In achieving this composite objective, strains appeared between the general and the special elements in the administration. The programme was mainly in the charge of an emergency national agency which in its totality was represented in each state area by an appointed director, whose command was carried down to district directors. Only a few of the non-manual types of projects, such as theatrical undertakings for unemployed actors, were handled outside of this hierarchy. Therefore, the problems of appropriate diversity and balance had to be met within the normal structure. The directors were often engineers ; in any case, the relative weight of the programme inclined them to think largely in terms of physical construction. In these circumstances, it was important, for the realization of the programme's full intent, that the diverse functional units at national headquarters, each of which was concerned with a phase of employment, should have enough direct influence upon the operating levels to keep the programme sufficiently broad in its coverage and to suggest to various district heads the ways by which to fill needs that might otherwise be neglected. In this emergency experience, the practice of dual supervision was not formalized. Even as a merely implicit necessity, however, it exemplified a widespread administrative problem. As an illustration, what I observed in the administrative experience of the work relief programme comes to my mind now ; in part because a few generalizations which I made at the time have been noted as relevant to certain aspects of village development where specialized functions like agriculture and health are channelled in a community programme.

The adjustments that may be involved in this problem are being demonstrated in the evolution of Community Development in India.

They involve the working relations of those who are in general administrative command in the districts and blocks—the Collectors (whatever may be their present or future titles) and the Block Development Officers—to the representatives of the subject-matter departments. The issues are sharpened by the stress upon local initiative and decision in the name of democratic decentralization. These issues present perplexities of structure which are endemic in many societies. They are especially marked when new technologies are brought to bear in simple, isolated environments. Apart from their intrinsic importance, these emergent situations afford rich material for a discussion of the universal aspects which we have already mentioned.

In India, the relationships are given a distinctive turn by its federal structure and the relative responsibility of the state governments in welfare programmes and generally in accomplishing the objectives of national planning. In the present chapter, however, we shall largely disregard these federal aspects.

II

Before passing to the question of dual supervision as illustrated in community development, it is useful to contrast the alternative patterns of field organization as exemplified in many countries. Our comparisons are made without major regard to any federal feature. In this frame of reference, England and the United States illustrate the situation where administrative deconcentration exists without any authoritative field representatives of the central government as a whole. As a type they differ from countries in which the centre is represented regionally by appointed "prefects" or like officers.

The System of Separate Field Services

In the United States, each of the national ministries and independent agencies has developed its own field services throughout the country. In many cases, especially in regulatory matters, the coverage is complete, even to the ultimate local level; in some service functions, however, the coverage is modified because the state governments are enlisted through grants-in-aid for the performance of joint programmes, as in unemployment insurance and the construction of main highways. In general, the functional projection of country-wide field services does not represent the national departments as

wholes. With each of them, the separate bureaus tend to erect their own field organizations. Sometimes, the proliferation extends even to bureau subdivisions which have fairly distinctive purposes.

Certain advantages attend the practice of allowing each department, and sometimes each major subdivision, to devise its own field organization under officers who are subject to its exclusive direction. This eclectic system permits each administrative branch to choose operating areas which suit its purposes. It facilitates, though it does not ensure, contacts between experts at central headquarters and those in the field. This is a relative matter however; for, as we have said, even a departmental subdivision includes specialities whose adequate reflection in the agency's actual work may present a continuing problem. The main advantage of the scheme is the possibility of increased energy where a segregated field service has a concentrated responsibility under direct control. It should be added that this arrangement does not preclude consultative relations with the particular interests which are affected by the agency's work. Thus the costly and complicated price-support programmes of the United States Department of Agriculture have been carried out through a direct, country-wide field organization. This administrative net-work, with its system of quotas and payments, includes a system of committees of farmers at county and community levels, who are paid for part-time service in making certain subsidiary inspections and decisions, subject to the possibility of a fully official review. Such participation is a merely incidental feature of a specialized field hierarchy for the conduct of a single function.

Similarly, the departments of the state governments in the United States have built their field structures along functional lines. No omnibus headquarters below the state level exist for either the purposes that the states discharge directly, like factory inspection, or for purposes that are carried out in part by delegation to the units of local self-government.

In all these uses of a multiple organization, the attendant disadvantage may be a lack of coordination among the programmes which are carried out by separate field establishments. Various partial correctives are available.

In the United States, for example, the representatives of different national agencies who face common problems may consult with each other through inter-agency committees or councils at regional or local levels. This tendency has been encouraged in some parts

of the country by the regional representatives of the Bureau of the Budget, the chief managerial staff agency in the Executive Office of the President. Representatives of the states in the area may be drawn into such gatherings. In addition, there has been a fluctuating tendency for the national agencies to use regions that have common boundaries and headquarters cities. Ideally, their regional representatives can even use the same building. Such standardization of areas as exists has been more practicable for intermediate supervision than for operations. In the latter case, the areal needs of the different functions are likely to be more distinctive. Thus such a matter as the inspection of meat at the points of slaughter, centred in the great live-stock markets, differs from the inspection of wheat to enforce the official grain standards, which is conducted as the wheat moves toward the produce exchanges; yet both forms of inspection are under the same department. Even at the regional supervisory level, the use of common areas is far from complete. When it exists it does make it easier to maintain daily contacts in matters of mutual interest. The adjustment of policies is possible to the extent that a considerable degree of discretion is vested in the field supervisors.

In England, as in the United States, a system of prefects does not exist. Special arrangements have long existed for Scottish affairs. In the country as a whole, some provision is made for regional coordination. During the Second World War, eleven Civil Defence Regions were created. They were designed in part to serve as self-contained organizations that would be capable of carrying on the work of government in the case of a disaster like invasion. Since the war the eleven regions have been retained but for more modest purposes. The machinery is different and essentially advisory. The emphasis is upon balanced economic development, increased productivity, and industrial peace in each region. Accordingly, a Regional Board for Industry exists in each of the eleven regions. It consists of representatives of employers and employees as well as the senior officers of national ministries who serve within the region. The chairman is a full-time officer; he is appointed by the Chancellor of the Exchequer, to whom he has the unique privilege of full access at all times. The eleven regional chairmen are ex-officio members of the National Production Advisory Council on Industry, which directly or through committees, gives advice to Cabinet officers on general economic conditions and practices. Its terms of reference in recent years have stated that it exists "to advise ministers upon

industrial conditions and general production matters (excluding matters which are normally handled by the joint organizations of trade unions and employers in connection with wages and conditions of employment) and on such other subjects as may arise from the proceedings of the Regional Boards for Industry". Apart from the stimulative and harmonizing influence of the regional apparatus upon industrial policies, its incidental availability in the standardized areas is helpful as a means of contact among the field representatives of various ministries.

In appraising these arrangements, it should be remembered that both in England and the United States, elective units of local self-government existed before the modern public functions began to multiply and to project themselves from national headquarters through separate field establishments. Indirectly at least, these local institutions have partly offset the lack of coordination among the multiple field structures of the higher governmental levels.

The Prefect System

The prefect system, as it is often called, stands in contrast to the foregoing types of multiple field structures. The system exists widely. Brian Chapman, in his recently published book, *The Profession of Government*, which compares the western countries of Europe, remarks: "In every country there is always a senior state official at the level of the province. He represents the government, and is the chief state official in the area, appointed, paid by and responsible to the central government, normally through the Minister of the Interior." Mr Chapman notes that the title varies: Governor, Civil Governor, Commissioner to the Queen, Provincial Governor, Prefect. He adds: "All are based on the same general principle: that the government needs its own representatives in the provinces to coordinate the national services operating there, to ensure that local authorities act within the law and use their discretion reasonably, to act as the ultimate authority for maintaining local order, and to act as a focal point for common interests between different authorities."

An example of the widespread use of this European Continental model—historically, one may say Empire model—is Turkey. In each of the sixty-odd provinces, a governor is appointed by the Council of Ministers on the nomination of the Minister of the Interior. He is intended to be the representative, not only of the Ministry of the Interior to which he is organizationally tied, but also of each of

the other ministries. Accordingly, he is the administrative superior of the officials of the other ministries who serve within the province. He becomes the common agent of all the ministries and, as such, receives orders from them which it is his duty to transmit to the officials of these ministries. At the same time, they are allowed to communicate directly with their ministerial headquarters on "technical and accounting matters". The governor is presumed to be the final judge of what matters are of a "technical" or "accounting" nature. In this complex of relationships—almost inevitable where the prefect system exists—the governor embodies the principle of organization by area and the principle of general administration. The principle of function is embodied in the ministries, in their officials within the provinces, and in the technical units at national headquarters with whom they may communicate directly.

The elements of dual communication which are illustrated in this situation are not unworkable when they are clearly conceived and well-understood and when the system is operated by reasonable, resourceful men on both sides. At its best, such a system might promote decentralization by absorbing at the intermediate levels many problems of adjustment that might otherwise rise to the centre. Practical tendencies in France, however, show the difficulty of maintaining the prefect's omnibus authority. Alfred Diamant, commenting on this matter in a symposium on the comparative study of public administration, published in 1957 by the University of Indiana Press, traces one of the sources of difficulty to the fact that "the field services have become extremely technical and most prefects, still primarily generalist administrators, have neither the knowledge nor the inclination to deal with these specialists", whereas the specialists, in turn, believe that dealing with the prefecture will not only delay their operations but will taint them with politics. In systems of this traditional type, the participants are differently motivated. In Mr Diamant's words, "The prefect's first concern is the maintenance of peace and order in his district; the specialist's first loyalty is to the standards of his profession and to the organization of which he is a part."

III

In India, the position of Collector in about three hundred districts has, in effect, combined features of the prefect system with the federal structure of India's government. The combination has been

facilitated by the existence of all-India elements in the civil service. The states create the post of Collector, building upon the traditional apparatus of order, justice, and revenue collection. The central government chooses the occupants through its methods of career recruitment to the Indian Administrative Service. It allocates them to the state cadres within which the state governments assign them to their individual posts or, on request, to the central government to fill its secretariat needs.

The system of collectors has not lacked critics amid developments that may change its role profoundly. Paul H. Appleby, writing in 1953 against the contrasting back-ground of rigorous hierarchical field organization on functional lines, commented thus on the Collector's position: "No ministry knows how much of his time it is entitled to, and none has the capacity for ensuring that it receives that portion of his time and energy. The result has been a halting and rather unclear removal of certain functions and personnel from his direct jurisdiction, but this arrangement involves in its turn an interaction of the responsibilities and personnel of the ministries of health, education, and agriculture, along with the home ministry and the ministry of finance, in association with the development of community projects offices, and some lingering associations with the Collector."

On the other side, I note that Dr K. N. V. Sastri, in a recent little book on *The Principles of District Administration in India*, believes that it would be premature to dislodge the Collector from his non-elective, centrally appointed position. A chief reason, argues Dr Sastri, is "that Five Year Plans are national schemes and centrally guided whatever may be the autonomy of the states in drawing up their budgets. The gap between the experts at Delhi and the worker at the village level is large, especially in the matter of technical knowledge and the utilization of the one and the full employment of the other requires a responsible regulator."

I believe that under Indian conditions a useful asset is at hand in the retention of the system of District Collectors, although this respected title is already unsuitable in the light of changing duties. As a valuable coordinating device, however, the office can be developed in its full potentialities only by earnest efforts at re-adjustment both of men and of structures. Fortunately this effort is going forward. On the personnel side, I have heard the guess of a knowledgeable central officer that perhaps thirty per cent of the existing Collectors

are attuned in thought and feeling to the current drive for community development including the attempted shift of responsibility and initiative to locally responsible bodies. The Collectors now in office are being taken in groups of ten for short re-orientation courses in problems of community development, which they discuss in company with persons connected with the programme in other ways. The long-run correctives involve future tendencies in the recruitment, training, and assignment of members of the higher civil service.

On the structural side, the addition of duties in welfare and productivity has already enlarged and is bringing a subdivision of an office that has been largely concerned with revenue (including land questions), order, and justice. The Collector's role as magistrate is being absorbed in the extended judicial system. For the rest, it would be unfortunate if, in the internal subdivision of the Collector's office, the revenue and related duties were assumed by the principal while development functions were relegated to an associate head. Rather, the relationship should be reversed. Such an arrangement would be a more constructive use of the prestige of the Collector's office during a period of profound transition in local affairs. It would encourage attention to matters that require judgment, finesse, and energy in coordinating the activities of the representatives of the various state departments and in serving as adviser to the popular organs that are being developed at the district level. In at least one state the Collector is the chairman of the standing committees of such a body. This may become a tendency.

In these circumstances it is hardly premature to ask whether there should not be a relaxation of the old rule of service for no more than three years in the same district. In the past this rule, or convention, has been defended in part on the ground that it preserves the detachment of the Collector from entangling friendships or associations in any district where he serves. Future developments may show that this argument has lost its force in the light of new duties and a less disciplinary role. Much depends upon how vital the districts as areas will prove to be in the conduct of developmental programmes. It is likely that in most states, if not all, the stress will lie at the block level so far as it does not rest in the villages.

The broad theory of these programmes seeks, on the one hand, to integrate community development in the existing administrative structure and, on the other hand, to embody it in a new general system of rural self-government.

The first aspect of this theory was commented upon favourably by a group under the auspices of the United Nations' programme in technical assistance. In their findings made at the request of the Government of India and issued by the Government in April 1959 under the title *Report of a Community Development Evaluation Mission in India*, the members of the study group remarked: "The Mission recognized that the Community Development Programme in India, though of recent origin, has been integrated into the administrative system of the country. It found that care was taken not to create a separate administrative machinery or hierarchy, and that the lines of communication and authority go to the division commissioners (where applicable) and then to the district collector or magistrate, who is responsible for the community development programme implementation at the district level."

As to the second feature, as things stood before the movement was fully under way to provide by law for the local machinery of "democratic decentralisation", the Programme Evaluation Organisation remarked in its sixth report, issued in 1959: "The Community Development Programme was sponsored by the Government and is still largely administered by the bureaucracy. But the accepted objective is to make it a people's movement, with the villagers taking over the responsibility for framing and executing plans for local development."

The influences and control are multiple. Horizontally, at both the Central and State levels, the technical thinking of various ministries must be woven into the pattern. At the Centre, the Ministry of Community Development and Cooperation acts as a catalytic agent; in the states development commissioners, variously styled, serve in that capacity. They are likely to be most effective when they work in close association with the Chief Secretary. At both levels, much use is made of inter-agency coordinating committees which bring together the elements represented by such ministries and departments as Food and Agriculture, Animal Husbandry, Health, Education, and Commerce and Industry. An overall concert is aided by the annual All-India Conference on Community Development, attended by the Minister for Community Development and Cooperation, the state development commissioners, and the senior staff members of the Community Development Ministry and certain other ministries.

Vertically, the distinctive subject-matter purposes of the central ministries and the objectives and technical supervision of the corres-

ponding state departments are projected downward, normally through the districts to the blocks. Ultimately, much of the integration takes place in the person of the multi-purpose village worker, upon whose check-list of items for attention over sixty matters are sometimes mentioned although his paramount duty lies in agricultural production. At both the district and block levels, the scheme calls for a working combination of administrative and technical supervision.

IV

The concept of dual supervision is illustrated in a provision of the Rajasthan law of October 31, 1959, called the Panchayat Samitis and Zila Parishads Act. Each Panchayat Samiti is composed of the heads of the panchayats in the block. It is to "exercise administrative control" over the Vikas Adhikari (as the Block Development Officer is called) and the staff members who work in the block. The State Government, it should be noted, appoints the Vikas Adhikari. The law sets forth his duties. They include the exercise of "supervisory control over the acts of all officers and agents of the Panchayat Samiti, including the staff borne on the establishment of the Panchayat Samiti and the staff working on institutions and schemes transferred by the State Governments to the Panchayat Samiti in matters of executive administration and matters relating to accounts and records of the Panchayat Samiti". To the foregoing is attached a proviso, as follows: "that technical control over such officers and servants of the Panchayat Samiti shall continue to vest in the officers of the concerned technical departments of the State Government, who shall also have the power to inspect and supervise, from the technical point of view, the work of such officers and servants." Most of the far-reaching problems of dual supervision are implicit in these allusions to "technical control", "technical departments", and "the technical point of view".

The conventions and habits of work that are necessary for the smooth conduct of such a system of mingled technical and general administrative guidance do indeed make heavy demands on the good sense and reasonableness of all who are concerned, officials and non-officials. I have said enough in earlier pages to show my belief that it is a fairly universal necessity. Doubtless in any programme that is novel and complicated, the mutual awareness that is involved comes by degrees through experience. In the activities that fall within

community development, strains have existed that must be recognized and resolved.

The United Nations study group, already mentioned, called attention to one side of the problem when it remarked: "... the community development programme must give the technical expert his due in modern society, treating him on at least the same footing as the administrator proper."

The other side is brought into relief by a staff survey among workers at the block level, made on behalf of the Team for the Study of Community Projects and the National Extension Service, authorized by the Committee on Plan Projects, which reported in November 1957. The staff survey of opinion among those in charge at the block level reflected considerable grumbling. In the words of the report: "They say that the greatest difficulty in coordination at the Block level arises from the departmentalised outlook of the personnel of the regular departments. Inevitably the specialists give priority to their departmental activities outside the project area and sometimes even neglect their normal activities within the Block. So long as the individual officers have to make their careers in their respective parent departments they will seek to look upon their placement in the Blocks as short interludes which one has to get over within the course of one's career. In some cases there is even the fear that, being out of sight of the departmental boss, they are also likely to be out of his mind."

The passages I have quoted are symptoms of difficulty. As symptoms, they are not less significant because complaints of this sort must usually be discounted in terms of a natural impatience. Such statements are important as indications of the problem. In themselves, they are not sign-posts that point to the solution.

As to the general direction of the path to be followed the final report of the Study Team itself (in a document which has had much influence upon emergent patterns in Community Development), restates our problem in constructive terms which are worth quoting at some length. The analysis bears particularly upon the situation in the block. "Coordination of the activities of the various extension officers", they noted, "has offered a fruitful source of disagreement in various departments. There is no doubt that the scheme envisages that the Block Development Officer should function as the captain of the team. The connotation of that phrase, and its implications have, however, been different for different people. We are satisfied

that there has to be coordination and that coordination can be secured only by the Block Development Officer. But coordination should never be intended to mean either centralisation or erection of 'road blocks' between the block level officers and their departmental supervisors at the district level."

The report went on to say: "Difficulties now experienced would be eased considerably if every head of department and his district officers realized that the work in the development blocks is as much their concern as the departmental activities outside the blocks. The Block Development Officer on his part must clearly realize his responsibility to the district level departmental officers."

In 1959 the report of the Plan Evaluation Organisation observed that "the system of dual control has not as yet established itself as a success". In only fourteen out of thirty-eight blocks which were studied was the interdepartmental coordination regarded as satisfactory. The report suggested that coordination would be strengthened by making the Block Development Officer "the drawing and disbursing Officer in the block for the developmental departments". This step has been taken in some states.

The future of the Block Development Officer is uncertain in some respects. An unresolved factor in the situation is the coming role of the head of the Panchayat Samiti. In many places he gives much of his time to the work and generally he is tending to give more. It is conceivable that he will become a salaried officer though not a career official. Assuming that this possibility does not eventuate, and indeed even if he is paid a stipend, one can imagine a working relation between him and the Block Development Officer which would bear some resemblance to that which exists in a city-manager system, at its best, between the mayor and the manager. In any case, serious questions arise in connection with the source and tenure of Block Development Officers. It is preferable that they should not come from the revenue service. It seems undesirable that they should be limited by convention to a few years of service in any one block and it is unfortunate that so often their path of advancement takes them quickly out of block service altogether. Their role is one in which a deepening acquaintance with a locality and its people is likely to yield increasing returns. The Community Development Programme as a whole would profit from more opportunities for "promotion in place" as a principle in handling the personnel who are involved. I venture to believe that the admirable tradition of

mobility in the Indian civil service should make terms with this other need.

On the question of the practicability of the distinction between administrative and technical supervision, it is my impression that in practice there is already a large amount of mutual agreement as to the nature of each item of business. Significantly, it is not easy to find instances where higher authorities have been required to decide a dispute over the question whether a given matter was technical or administrative. The general administrators—District Collectors or Block Development Officers—are disposed to defer to technical judgment. When the general administrator intervenes, it is sometimes only to make sure that all the technical alternatives have been explored. A few illustrations will suffice to show the aspects that are recognized as administrative. If a bridge is being considered, the design and the estimates of cost as well as the preferred location are technical decisions, but it is properly an administrative judgment to take account of public protests about the inconvenience of the proposed location and to approve a different though practicable site even at an increased cost. In the case of seeds, their quality and suitability are technical questions but the conditions and methods of their distribution raise administrative issues. The award of loans is technical but the question of leniency if they are not repaid involves factors that call for an administrative decision. In a different sense, it is an administrative question, to be decided in the light of the total situation, whether a particular employee should be allowed to take leave at a particular time in accordance with the routines of his department. In such a situation it is the general administrator's duty to protect a programme in which a number of agencies and individuals are involved. In the same spirit it is his prerogative to advise against the transfer of an employee whose departure might seriously harm the operating programme in a given locality.

The foregoing, given almost at random, are examples of lines of distinction that those who practise the art of administration learn to apply in developing the conventions of dual supervision.

CHAPTER IV

ADMINISTRATION IN FEDERAL SYSTEMS

DEVELOPMENTS in modern federalism (whether in practices under an old constitution like that of the United States or a document which, like India's, has winnowed the experience of many places) present distinctive problems in the adjustment of function and area. The federal pattern of constitutional devolution, as I have called it, throws heavy emphasis upon area as the main basis of division. It presents a double problem of coordination. First, the constitutional nature of federalism limits the ability of the central government to control the action of the constituent governments as entities. Second, so far as contacts develop and arrangements are made (through grants-in-aid or otherwise) between functional units at the centre and the corresponding functional elements at the lower level, these relationships may prevent comprehensive and balanced handling of policy at this level.

Much of the accommodation in older federal systems has consisted of weaving strands of functional union between the levels and among the areal divisions. Most of this has come without any express constitutional prevision or provision. Recent federations may provide expressly for some of these relations. Their essence, however, tends to remain multiform and flexible. They are administrative in a broad sense of the word, even when legislation is involved at both levels.

It is such considerations that direct our attention ever more sharply to the administrative aspects of federalism, as distinguished from judicial action in umpiring the distribution of legislative powers between the central government and the constituent governments. But these administrative aspects can be understood only in a constitutional context. Especially is this true in the case of older constitutions. Moreover, it is necessary to keep in mind the circumstances that underlie the appearance of federalism as a constitutional form, the values that it is intended to serve, and the difficulties and deficiencies that it encounters. These matters are a necessary background for a discussion of the administrative adjustments that are going on in contemporary federalism. It is appropriate, therefore, to pause for

such a survey, including comment on the United States as a case study of adaptation in an older model.

I

As a principle of many applications, federalism is one of the great inventions of mankind. It is the principle that enables many to form a common one while the many retain their separate identities. Precisely because its applications are so varied, federalism is an elusive term, even when confined to constitutional forms. De Tocqueville in *Democracy in America* was speaking of federalism in the United States, the novelties and mixed character of which he was seeking to describe, when he made the characteristically wise and felicitous remark: that men are more adept at inventing new things than new words.

Historically, federalism has usually appeared as a device by which a general government could be created for a people who, in A.V. Dicey's classic phrase, desired union but not unity. In this historical setting, federalism has been a centralizing movement, but only a partial one because the elements of territorial diversity and autonomy have insisted upon maintaining a semi-independent existence as the price of entering into the union at all.

Later, when the spirit of nationality has increased, when the union has been firmly established, and when economic and other influences tend to be nation-wide in scope and effect, federalism (once a centralizing impulse) takes on the character of a decentralizing force. At this stage, the condition is not unlike what exists when federalism as a constitutional form is devised to replace a previously unitary situation, as in Canada and India. Moreover, it should be remembered that in the case of the United States, only thirteen of forty-nine states (disregarding Hawaii) had an existence before the federal union was created by the people of the thirteen states; all of the others were nurtured by the union before they were admitted to it as states with constitutionally equal powers.

When the original justification of federalism as a necessary compromise has disappeared, the system of constituent governments (each complete in itself and based upon its own elections) may have positive virtues.

1. Thus it may be said that the ideal of "government with the consent of the governed" is increased under federalism. This happens if the elements of conscious diversity which are seeking expression

are concentrated in particular areas, instead of being scattered through the country.

2. In any case, it may be said that legislative experimentation is helped by the system of constituent governments, each free to go its own way within the wide leeway of power which they enjoy.

3. It can be said that the system is attended by elements of flexibility and adaptability which are desirable in countries of large size and population.

4. It can be said that federalism multiplies the points at which persons can gain political experience under conditions of responsibility, and that it helps democracy as an educational process.

5. It can be said, finally, that federalism may help to keep alive an opposition party because a party which is out of power in the central government may be able to hold or gain control in some of the constituent governments where it can develop leaders and partly demonstrate its programmes. It should be added that when only one party is allowed to exist legally within the whole area of the union, the system can be called "federal" only by straining the word.

So far as the foregoing conditions are virtues, it must be admitted that all of them can be achieved under a unitary constitution, provided there is the willingness to create local governments with strong financial and other legislative powers, based upon free elections and able to choose their own executives. On the other side, however, is the unlikelihood that a unitary state would create and maintain so full a degree of territorial devolution or, at any rate, that the tradition and morale of local initiative would be as strong.

A federal system suffers from certain difficulties. They increase under modern conditions unless the system can adapt itself without losing its federal character.

It is enough here to indicate some of these difficulties:

1. The powers of the central government may prove to be too limited in the face of changing conditions, especially in dealing with matters that require uniform treatment.

2. Meanwhile the constituent governments may be unable or unwilling to act. The difficulty may arise in dealing with entities, like industries, which can be regulated effectively only as wholes. Or the trouble may come from the fact that individual states fear to act lest they put themselves at a competitive disadvantage, in the face of the threat of private business that it will leave the state or be

unwilling to invest there under conditions more onerous than in other states.

3. Under federalism, the boundaries of the constituent governments tend to become fixed—probably more so than the divisions within unitary states—and, even where they originally suit demographic and economic conditions, changes in the distribution of population and industry may render the old boundaries increasingly inconvenient. In any case, something like a dilemma may exist in devising areas suitable for the long-run operation of a federal system. The ideal of vital self-government in the constituent states has two aspects: self-expression and self-support. Areas that are sufficiently homogeneous to serve the objective of self-expression (as in matters of cultural diversity or in some phase of economic specialization) may not contain a sufficiently balanced spread of resources to provide a firm tax-base for self-support.

4. An uneven distribution of taxable wealth among the areas makes it difficult to maintain a common level of governmental services. This condition is not peculiar to federalism; but a federal system may be less equipped than a unitary government to deal with this problem comprehensively.

5. Federalism involves, not only a multiplicity of legislative apparatus, but also the risk of duplication of administrative apparatus at two levels and among the constituent governments. The arrangements by which such duplication is lessened may, in turn, involve a degree of dependence on the state governments or upon interstate mechanisms which may lead to a possible weakening of responsibility.

6. The participation of federal states in international affairs may be hindered if the central government is unduly limited in the scope of its treaty-making power or in its ability to enact legislation in support of its commitments. From the other side, the constituent governments, within their fields of power, may do things, or fail to do things, that embarrass the country's foreign relations. Moreover —again as a matter of theoretical possibility rather than occurrence in successful federations—the degree of independence of the constituent states might give an opportunity for foreign intrigue to gain a foothold in the country's politics.

7. Instead of protecting minorities, a federal system may result in their domination by the majorities in the populations of certain of the constituent states, except in so far as this situation can be checked or corrected by devices such as universal constitutional

guarantees which can be effectively applied by the central judicial organs.

8. It can be said, finally, that the maintenance of an equipoise of powers through their territorial distribution in the constitution, further complicated by constitutional guarantees, depends upon and encourages a spirit of legalism, which (as Dicey suggested in *The Law of the Constitution*) may contribute to a generally conservative attitude in a federal state.

The foregoing catalogue of difficulties is not an indictment; it is not a disproof of the virtues that may lie in federalism even when its adoption is not indispensable as the constitutional *modus vivendi* of union. All federal systems overcome the difficulties in some degree either by anticipating them in the constitution or by adjustments worked out through the years. These adjustments are influenced by changing attitudes that lie deep in social conditions and circumstances. Their accomplishment is aided by constitutional amendments, interpretations, or the conventions of practice. To a very large extent, as has been said, the adjustments are administrative in their essential nature.

From the administrative standpoint, two types of federalism have been in contrast historically: those characterized by direct federal administration (to echo the descriptive phrase I have already used) in which the central government relies on its own agents for the carrying out of its own purposes; and indirect federal administration, in which the central government relies heavily upon the state apparatus for the execution of its policies. The difference of which I speak is one of emphasis, though not less important for that reason; no federal nation has used exclusively direct or indirect methods. In the past, the United States, Canada, Australia, and several Latin American federations have been marked by mainly direct types of federal administration. In contrast, a larger dependence upon indirect methods was found in the federal systems on the European continent. Present-day Indian federalism claims special attention from the standpoint of its distinctive combination of the direct and indirect elements. Before turning to certain crucial questions that are involved, including state responsibility for the realization of national plans and the scope of state initiative within and beyond these plans, it is useful as background to trace the constitutional evolution of federalism in the older systems, notably illustrated in the United States.

II

Whereas Indian federalism is the outstanding example of federal constitution-making in recent times, the United States represents the adaptation of a system under a constitution drafted at the end of the eighteenth century. Only one amendment in the course of all the intervening years has directly enlarged the legislative power of the central government. Moreover, that amendment (the sixteenth, 1913) was to correct a decision of the Supreme Court which had held that an income tax on an individual is a "direct" tax and therefore could not be used unless it complied with the constitutional provision that "direct" taxes must be levied among the states in accordance with their populations.

The central government of the United States is said to be one of "delegated" or "enumerated" powers. In this sense, it inaugurated the classic model of federalism in the modern world. The list of these enumerated powers remains the slenderest among the leading federations. The influential members of the Constitutional Convention of 1787 were intent upon building a nation and in this sense they embodied a centralizing impulse. However, in the face of widespread reluctance to create a stronger national government—a reluctance abundantly revealed in the fight over ratification—the draftsmen asked for what seemed a viable minimum of powers. In general, these powers deal with far-reaching phases of the national life—like inter-state and foreign commerce, which touches innumerable fields of activity but does not cover all that they involve. In general, too, the central government's power to legislate about a given matter does not preclude state action which does not conflict with the national action. Concurrent jurisdiction is thus permitted in the sense of separate national and state legislation in the same fields, subject always to national supremacy in cases of inconsistency as determined by the Supreme Court. But (with unimportant exceptions) the constitution makes no express provision for concurrent legislative action in the sense of interlocking fields of law-making in which the framework for a composite policy may be deliberately provided by enactments of the central government. Only in practice, and then implicitly, did elements of this pattern develop in the evolution of American federalism.

On the administrative side, the United States Constitution is nearly silent. In the Presidency it does expressly provide what Alexander Hamilton included among "the ingredients of energy", that is, unity

and duration. A measure of unity was assured by providing that all "officers of the United States" must be appointed by the President, subject to confirmation by the Senate, with the proviso that Congress might vest the appointment of "inferior" executive officers in the hands of the President alone or the heads of departments. The creation of a vast national administrative establishment rested upon the implications of such phrases as the reference to the "heads of departments" and statement, at the close of the enumeration of powers, that Congress might do all things necessary and proper to carry them into effect.

The possibilities thus opened for direct federal administration—that is, the execution of the laws of the central government by its own agents without dependence on the states—were emphasized by the historical circumstances which led to the Constitution of 1789. It replaced an earlier constitution, called the Articles of Confederation, under which the country had been governed since 1781. In this looser form of union, the central government had been dependent upon the state governments in crucial ways, including financial support through requisitions. The new constitution was framed in reaction to this and other elements of weakness. It is true that in the early years the laws of Congress did provide for the alternative use of certain state facilities (mainly judicial) as a convenience in enforcing national laws at a time when transportation was poor and the network of national agencies had not become widely extended and accessible. Soon, however, even these minor uses of indirect federal administration were dropped. An implicit doctrine of the Constitution is still the principle that neither the central government nor a state government could impose a burden upon the other. Certain minor exceptions are expressly provided for in the Constitution, especially as to the role of the states in the conduct of national elections. Basically, the doctrine has meant that state participation in national purposes rests upon a voluntary basis.

Only in the judicial realm has the United States Supreme Court held that a national law can impose a duty upon a state agency. When the national liability act for railway employees provided that the injured worker might sue in either a national or a state court, the Supreme Court ruled that even a reluctant state court must assume jurisdiction. In the same way it upheld the obligation of a state court to act in suits for penalties under a national price-control act. The Court's dictum on the latter occasion did emphasize the inter-

dependence of the central and state governments; it spoke of the irrelevance of international doctrines about the relations of sovereign states in the enforcement of each other's laws. Nevertheless, in the United States the extensive, multi-form edifice often called "co-operative federalism" has been erected thus far upon the voluntary bases of mutual interest and persuasion. As we have said, these developments have been administrative in spirit and largely administrative in method. Before speaking about the administrative aspects in particular, as a basis for comparisons with Indian federalism from this standpoint, note should be taken of some major trends in the judicial interpretation of the distribution of powers in the American federal system. These trends shape the setting of the administrative problem.

III

The power of Congress to enact laws for the regulation of economic matters is now wide enough to deal, in part at least, with any question that could be identified as important. This possibility has been opened by the Supreme Court's interpretation of the Constitutional clause that empowers Congress "to regulate commerce with foreign nations and among the several states". The wide scope of Congressional power over interstate comerce was finally conceded by the Supreme Court in decisions in 1937 and 1941 that upheld the constitutionality of the National Labour Relations Act and of the National Wage and Hours Act (setting a minimum wage and maximum hours for workers in interstate commerce or who produce goods for interstate commerce or whose work materially affects the production of goods for interstate commerce). In the latter decision the Supreme Court held that the judgment of Congress as to reasons for regulating interstate commerce was "plenary", even when it involved barring from interstate commerce goods made under conditions which Congress wished to prevent. The Court expressly reversed its precedent in 1918 when it invalidated an act of Congress that sought to bar from interstate commerce articles in the manufacture of which child labour was involved. The decisions of 1937 and 1941 (not to mention others to the same effect, including power under the commerce clause to impose mandatory acreage quotas in connection with farm price-support programmes, which applied even to produce consumed on the grower's farm) seem to open the way for Congressional regulation of any matter that is sufficiently ramified to involve

interstate commerce. Important economic questions almost inevitably involve such commerce.

However, the intrastate phase may remain beyond the reach of Congress. The Supreme Court is cautious about allowing Congress to assimilate the intrastate phases of a problem in its regulatory acts under the commerce power, unless the Congressional intent to do so is clearly shown and is based upon an inherent interdependence of the interstate and intrastate elements. Even in the regulation of railroads, where the doctrine of interdependence was first notably accepted in allowing the Interstate Commerce Commission to order an increase of intrastate rates, the Court said that the Commission was merely to set a framework of rate-policy within which the state regulatory bodies would exercise their judgment in handling intrastate traffic questions. The Court has continued to ask for a showing of proof of the interdependence of interstate and intrastate rate adjustments when the Interstate Commerce Commission seeks to extend its orders to the latter field. Moreover, the Court has been reluctant to extend to other fields of economic regulation even the qualified doctrines that it worked out in the field of transportation. For example, it refused to regard its precedents in this domain as applicable to the Federal Trade Commission when that body, in connection with its duty to prevent unfair methods of competition, attempted to forbid unfair practices by a business concern wholly engaged in intrastate commerce which the Commission believed were making it more difficult to control these practices in interstate commerce. Indeed, it can be said broadly that national regulation under the commerce power is substantially complete only in regulation of radio broadcasting and television, and, in a different sense, in price-support for certain agricultural staples. Even in aviation, where swift motion makes state boundaries largely unreal, some state regulation survives, although it sensibly accepts the standards of the national Civil Aeronautics Board and makes the possession of a national licence also a requirement under state law. I may add that I am leaving out of account here the national programmes which, like the control and development of atomic energy, have their initial constitutional basis in the so-called "war power" of Congress. This power is comprehensive, if applicable at all; it is not confined to interstate aspects; but it is assumed to exist only for limited purposes. So, too, it is assumed that the "treaty power" will have relatively limited use as a constitutional basis for national regulation of economic matters. The

main burden of sustaining national regulation will continue to rest upon the "commerce power".

The result is that most national regulatory action in the United States is attended by the problem of complementary state action. Such action may be of many kinds. It may take the form of state laws which are modelled on the national act; it may go no further than the recognition of certain crucial national standards in state laws which otherwise vary widely; it may involve national-state administrative cooperation in joint bodies to formulate these standards; sometimes it involves joint enforcement boards, as in the regulation of the interstate and intrastate operations of a utility company. These functional relationships and arrangements are diverse, changeable, incomplete. The United States has not yet developed rational strategies of coverage in connection with its regulatory programmes. So far as the approaches to the solution are administrative, we shall return to this matter later when we discuss federal administration comparatively.

Continuing here with the question of legislative powers, we should note the ways in which the Supreme Court has enlarged the possibilities for independent state action, even when it was enlarging the scope of national powers. To move in these two directions simultaneously is not inconsistent with the spirit of federalism.

Throughout its history, the Court has been attentive to the desirability of a national market-place. It developed the commerce clause as a restriction upon the states; it invalidated state action (whether in regulation or taxation) that seemed to interfere unduly with interstate commerce. Its adherence to this idea has fluctuated in the course of a hundred and fifty years. In recent years, a majority of the Court has been inclined to uphold the exercise of state power in many doubtful cases.

Meanwhile the power of the states to deal with economic matters has been increased by the Supreme Court's change of attitude in interpreting the "due process clause". This is the clause in the Fourteenth Amendment (added after the Civil War of 1861-1865) which declares that "no state shall deprive any person of life, liberty, or property without due process of law", or "equal protection of the laws". For a long time the Supreme Court (reflecting the vogue of *laissez faire* thinking in the country especially during the closing decades of the nineteenth century) interpreted this language in ways that led it to invalidate many state regulatory laws. In doing

so it was profoundly changing the concept of "due process", originally a guarantee against arbitrary or incorrect executive action not warranted by law. The result was the rise of what is often called "substantive due process", as distinguished from "procedural due process". In applying the former to laws which sought to protect labour, for example, the Court seemed to construe the language of the Amendment as if it read: "no state, even by law, shall deprive any person of life, liberty, or property, in the crucial sense of the freedom to contract about prices, wages, or conditions of work, unless it can be shown that there are unusual circumstances which involve the public health,morals, safety, or convenience". As late as 1936 the Supreme Court invalidated a state minimum wage law under this view of due process. A year later, however, a dramatic shift took place in the attitude of the Court's majority, when it upheld the minimum wage law of another state in an opinion that reversed the earlier precedents and, in effect, renounced "substantive due process" as a ground for judicial annulment of laws in fields like economic regulation. It seems unlikely that the Court will ever revive "substantive due process" in those domains. So far as constitutional restraints are concerned, the states have been made freer to legislate.

It should be noted, however, that in recent decades the Supreme Court has broadened the Constitutional restraints upon the states in the fields of political rights and civil liberties. In defining the meaning of "liberty", as the word is used in the due process clause of the Fourteenth Amendment, the Court has looked in part to the First Amendment, which guarantees freedom of speech, press, assembly, and religious worship against infringement by Congress. When the Court invalidates state legislation on these grounds, or on grounds of denial of equal protection of the laws (as in school segregation), it is in form an exercise of "substantive due process". In a truer sense, however, the Court is acting within the spirit of "procedural due process". For the whole apparatus of responsible democratic government in liberal societies may be properly regarded as a vast procedure which includes the individual's freedom of conscience, his right and capacity of inquiry and expression, the right of communication and organization, and the electoral and other apparatus of government by discussion.

The ability of federalism in the United States to adjust itself to changing conditions has been due in large part to the flexibility of the "spending power" of Congress. This phrase indicates the discre-

tionary right of Congress (linked to the power to tax, in order "to pay the debts and to provide for the common defence and general welfare of the United States") to appropriate money for non-coercive purposes which are not covered by the enumerated regulatory powers. Thus it has been possible for the national government to develop many costly services, sometimes directly through its own agencies, sometimes through grants-in-aid to state and local governments. These developments bring us back to the administrative aspects of federalism.

IV

In contrast to the silence in the United States Constitution about the use of the states as executive agents of the central government, India's Constitution goes further than a mere declaration of the supremacy of the central government's law within the field of its jurisdiction. Article 256 declares: "The executive power of every State shall be so exercised as to ensure compliance with the laws made by Parliament and any existing laws which apply in that State, and the executive power of the Union shall extend to the giving of such directions to a State as may appear to the Government of India to be necessary for that purpose." From the other side, the thought is repeated in the following article from the standpoint of ensuring that "the executive power of every State shall be so exercised as not to impede or prejudice the exercise of the executive power of the Union".

Article 258 adds the somewhat different principle of voluntary cooperation. It states that "notwithstanding anything in this constitution, the President may, with the consent of the Government of a State, entrust either conditionally or unconditionally to that Government or to its officers functions in relation to any matter to which the executive power of the Union extends". This authorization is accompanied by the interesting proviso that "any extra costs of administration incurred by the State in connection with the exercise of those powers and duties" shall be met by the payment of "such sum as may be agreed, or, in default of agreement, as may be determined by an arbitrator appointed by the Chief Justice of India". In passing, it may be said of the foregoing provision for the voluntary assumption by a State of enforcement duties that such a relationship is possible even under a constitution like that of the United States. The Congressional law that establishes a minimum wage and maximum

hours under the commerce power stated that the administrator of the act might enter into agreements with a state for the conduct of factory inspections under the act by the appropriate state department, which could be compensated for its expenses in such inspections. In practice, however, few such agreements have been made; for many years, the only fully operating agreement was with the State of North Carolina.

In India provision for the obverse of the type of relation I have been discussing was added to Article 258(4) by the Seventh Amendment, 1956, Sec. 18, which states that "the Governor of a State may, with the consent of the Government of India, entrust either conditionally or unconditionally to that Government or its officers functions in relation to which the executive powers of the State extends".

India's Constitution is not the only recently drafted constitution (disregarding those in Communist States which are strongly marked by features of indirect federal administration) in which express provision is made along this line. The present Basic Law of the Federal Republic of Germany states in Article 83: "The Laender shall execute the federal laws as their own concern insofar as this Basic Law does not otherwise determine or permit." Article 84 seems to confer a stronger oversight than in India. It states: "The Federal Government shall exercise supervision to ensure that the Laender execute the Federal laws in accordance with valid law. For this purpose the Federal Government may send commissioners to the highest Land authorities and with their approval and, in case this approval being refused, with the approval of the Bundesrat, also to the subordinate authorities." However, note should be taken of the fact that Article 87 provides for direct federal administration. Speaking historically and generally, there was more direct federal administration in the Germany of the "Weimar" Constitution before Hitler than in German federalism under the Empire before 1919; there is more today in the constitutional framework of West Germany than in the "Weimar" Constitution. The older system was doubtless helped by the paramount position of Prussia—a hegemony so preponderant that it was almost a negation of federalism itself. It was aided by something of a common professional background and temper among the graduates of the German universities who became higher civil servants in the Laender as well as the central government, despite the relatively equal prestige of a number of strong universities. It was aided, also, by the nature of the upper legislative chamber which

brought together representatives of the Laender administrations in the making of laws with opportunity to consider questions of enforcement along with the questions of policy. Some of these elements survive in West Germany today to help in the conduct of indirect federal administration on a reduced scale.

Certain of the foregoing features bear a distant resemblance, though in a very different setting, to administrative devices in India, particularly the All-India elements in the public services and the presence of the chief ministers of the states in the National Development Council which is geared to the planning process. In later pages I shall discuss the role of these and other features of Indian Government in handling a main problem in the operation of its federal system: namely, the extent to which the realization of welfare and developmental plans rests upon the states as self-determining instruments of national policy. In this relationship, it will be noted that much of the central leverage, so far as it does not lie in central investment support, is helped by grants-in-aid. This fact invites a comparison of certain fiscal aspects of American and Indian federalism.

CHAPTER V

RESPONSIBILITY AND INITIATIVE UNDER FEDERALISM

IN PURSUING the comparison of federalism in the United States and India as examples of administrative patterns and adjustments under old and new constitutions, it is appropriate to look further at fiscal relations, including the evolution of grants-in-aid. The questions that are involved lead logically to some general comments on the role of the Indian states in the preparation and conduct of developmental plans. The ultimate test in federal systems is the ability to combine responsibility in two senses: on the one side, in the necessary concert of action as a national society; on the other side, in the retention and development of initiative and vigour in the use of state and local resources.

I

Grants-in-aid in the United States are described as "federal aid" when the central government is the source of funds and "state aid" when the independent source is a state government in relation to local units. The term "services-in-aid" is sometimes used to describe forms of support from an upper level by way of advice or other administrative assistance which does not involve the transfer of money. The term "grants-in-aid" is not understood to cover support in the form of "shared taxes", whether shared upon the basis of their source or upon the basis of some measure of need, such as population, without regard to source. In the United States "shared taxes"—so prominent in Indian federalism—have been little used thus far between the central government and the states. The exceptions (which indeed are of a different character) are the "drawbacks" under the federal estate (inheritance) tax and under the national-state unemployment insurance system. In the latter case, the "drawback" is the motivating force in bringing all the states into a system which is supported by contributions from employers and employees collected under state laws as a tax on pay-rolls. It should be added that within many of the states, various forms of "shared taxes" are used as a supplementary means of revenue support for the local governmental units.

Grants-in-aid may be either conditional or unconditional. When they are unconditional, the recipient governmental unit can apply the money to whatever purpose it sees fit. In the United States, some use has been made of unconditional grants in state-local relations. Federal aid, however, has been almost wholly conditional, geared to specified purposes and therefore strongly functional in spirit and effect. The exceptions to this tendency have been minor and incidental, as in the provision for sharing a certain proportion of the proceeds from the national government's public domain, received from sales, royalties, or earnings of leased hydro-electric power sites. In such instances, the payment is intended in part to offset the fact that nationally owned property is exempt from state and local taxation under a doctrine that the Supreme Court has found to be implicit in the Constitution. While this inconvenient doctrine survives—and thus far, despite many complications and much complaint, it has been modified only slightly—there will be a tendency to mitigate its effect by making payments in lieu of taxation. However, as to the net effect upon the states and localities of intergovernmental tax immunity, it should be noted that the ability of the state and local units to borrow at low interest rates is helped by the fact that their bonds are exempt from taxation under the steeply-progressive national income tax.

The early basis of "federal aid" in the United States was not the "spending power" of Congress, which we have already mentioned, but was the so-called "property power"—that is, the power of Congress under the Constitution to regulate or to dispose of the property of the United States. The central government possessed a large public domain. As new states were admitted into the union—as for example Ohio in 1803—having passed through "territorial" status, Congress was accustomed to stipulate in the act of admission that a certain part of the public domain within the new state should for ever be dedicated to the support of some indicated purpose, such as education. However, these grants were not attended by supervision; there was no continuing procedure to enforce the trust. It remained for the Land Grant College Act of 1862 to launch the system of federal aid as a continuous administrative relationship. Like the earlier measures we have mentioned, the scheme rested upon the right of Congress to dispose of the national public domain. It was novel, however, in the fact that it permitted all states, even those within whose borders there was no nationally owned domain, to obtain land from the national public domain, wherever it existed,

on the ratio of 30,000 acres for each member of Congress—that is, roughly on the basis of population. The act provided that the proceeds from the sale of the land should be put in an endowment fund for the support of a college in each state which, among other things and without neglecting conventional subjects, would give especial attention to "agriculture and the mechanic arts". The added novelty was the requirement of regular reports to the central government. Some of the colleges established experiment stations as research adjuncts. In the late eighties, Congress gave the push that universalized this incipient movement. A grant-in-aid was offered to any state which established an experiment station in connection with the agricultural college. The United States Department of Agriculture—an independent bureau from 1862 until 1889 and thereafter a full fledged ministry—provided a clearing house for the research of the experiment stations.

Even before the end of the century, the basis of federal aid had shifted from the national domain and the "property power" to taxation and the "spending power". Its use was notably advanced and illustrated in two momentous enactments in the development of federal aid: the Agricultural Extension Act of 1914, which underlies the system of "county agents" and "farm demonstration work" conducted under the state agricultural colleges; and the Federal Aid Highway Act of 1916, under which the central government cooperates with the state highway departments in building the country's main network of roads. It is worth noting that such landmark enactments as these were built upon scattered and less formal beginnings. The methods of "farm demonstration" and rudiments of the county agent system had already appeared sporadically; thus, field representatives of the United States Department of Agriculture in the South were working in this direction in the face, especially, of the ravages of the cotton boll weevil after 1905 and the need for crop diversification in the cotton-growing areas. Or, to take the example of central involvements in highway construction, the central government as early as 1895 established a small unit to study and report on technical problems of road construction and, about a decade later, Congress had begun to appropriate money which could be given for experimental purposes in testing out the desirability of various kinds of surfacing materials.

What has just been said about these characteristically informal beginnings leads one to add a few words about the extent to which

federal aid, in a broad sense of the term, always overflowed the formal channels of schemes authorized by permanent legislation. In many situations, a department could, within the scope allowed by the language of the appropriation act applicable to it, arrange through a "memorandum of understanding" with the administrative authorities of a state or of many states for the conduct of a joint programme. Sometimes the central government's contribution consisted in the loan of personnel (still paid by the central government), sometimes in the provision of equipment, sometimes in the payment of money. The relatively successful programme to get rid of bovine tuberculosis in the dairy herds of the United States (which required more than two decades of patient work, freeing county by county of the disease) was conducted in this way, under arrangements in which the state governments made available their coercive regulatory powers and personnel and the central government contributed (along with advice) to the compensation of owners whose infected animals were disposed of in freeing the area of the disease.

The shift of the basis of support for the permanent systems of federal aid from the grant of land to the appropriation of money brought complaint on two grounds: first, that the central government would exercise undue influence upon the states; second, that the burden fell unfairly upon the states within whose borders a large part of the national revenue was collected. The second grievance was linked to the momentous change in the basis of the national revenue system which began in 1909 with the imposition of a corporate income tax and which was consummated in 1913 by the taxation of individual incomes. Previously the main sources of national revenue had been customs duties and excise taxes on such things as tobacco and alcoholic liquors. The incidence of such taxes bore a close relation to the distribution of population. It was not so with the individual income tax. As we have noted, it was not practicable to introduce this tax as a permanent feature of the national revenue system until the Sixteenth Amendment exempted it from the constitutional provision that direct taxes must be levied among the states in accordance with their populations. The importance of the financial revolution inaugurated in 1913 is shown in the fact that at present the income taxes furnish about four-fifth of the central government revenues. The elements in the population who were touched most closely by the income taxes—especially an individual income tax with rates that rose with the amount of income—became on the

whole a centrifugal force in American society. They tended to be against national expenditures generally, since these resulted in taxation of personal income; and thus they were inclined to oppose any enlargement of the central government's activities, whether executed directly or carried on by grants-in-aid to the states. The latter came under especially sharp attack.

In these matters, to be sure, few interests are likely to be consistently centripetal or centrifugal in their outlook and wishes regarding the exercise of central governmental power. There is an understandable criss-crossing of attitudes, depending upon the nature of different activities. This criss-crossing of viewpoints was neatly illustrated by incidents in 1917. In the previous year Congress had passed two laws which, in contrasting fields, were the furthest extensions of central legislative powers thus far in American history. One law was the Child Labor Act, based upon the "commerce power" and later held to be unconstitutional by the Supreme Court. The other was the Federal Aid Road Act, to which reference has already been made. In the spring of 1917 the governor of North Carolina, a Southern state, addressing the legislature in his regular message, was attacking the Child Labor Law when he said that "the conscience of North Carolina" and not "the covetousness of New England" should set the state's labour standards. In the same message, however, he went on to congratulate the legislature because of the passage by Congress of the Federal Aid Road Act which (he said) had at last made it possible for the state to look forward to a state-wide system of hard-surface roads. In the same week, the governor of Massachusetts, an urban state in New England, addressed its legislature. He alluded to the loss of industry which was migrating to states with lower labour standards. The recently enacted Child Labor Law would help, he implied, but in addition it would be desirable for Congress to establish a maximum number of hours for the employment of women in industry. The governor went on to refer to what he called the "Mud Road Act". He said that its unfairness to Massachusetts was obvious, for, in order to establish the fund that was to be divided among the states, it would take from the state in taxes upon its inhabitants many times more than it would receive as its allotment under the formula in the law. However, he said, the state legislature might as well comply with the terms of the act and receive its share, since the people of the state would be taxed anyway.

When, in the further development of federal aid, Congress passed a grant-in-aid measure for cooperation with the states in programmes to reduce the maternal death-rate and generally to improve conditions in this regard, the Massachusetts legislature instructed the state's law officer to bring a suit in the name of the state before the Supreme Court in the effort to have the law declared unconstitutional. At the same time, a taxpayer similarly attacked the law on the ground that money was being taken from her for an unconstitutional purpose, since the enumerated powers of the government did not include jurisdiction in the field of public health. The two suits were argued and decided together. The issue was the existence of the "spending power", never previously brought squarely before the Supreme Court. The decision in effect sustained the power although it rested upon the technical ground that neither an individual taxpayer nor a state when purporting to speak in defence of taxpayers within its borders, had any standing to maintain a suit. Moreover, said the Court, the state of Massachusetts was not coerced in any way; it need not join in the cooperative scheme unless it cared to comply with the conditions set in the Congressional Act. Some years later the Supreme Court discussed the "spending power" in a decision which dealt with the agricultural price-support law of 1933. This action took place before the Court's notable shift in 1937 to which we have already referred. The Court invalidated the price-support law on the ground that the benefits paid to farmers as an inducement to contract with the government for the restriction of acreage planted in certain crops amounted to regulation of an aspect of production that was not within the scope of the enumerated powers of Congress. In its *dictum*, however, the Court conceded that Congress did possess, and had exercised from the earliest years under the Constitution, the power to appropriate money "to promote the general welfare of the United States". The only restriction, said the Court, is implied in the word "general". So far as this view contains inhibitory possibilities, they have never been applied. Subsequent decisions seem to have put the "spending power" beyond likelihood of successful attack on constitutional grounds. Notably, this conclusion is supported by the Supreme Court decisions which sustained the various features of the social security system enacted in the mid-thirties. This legislation includes an unemployment insurance system, a nearly universal old age pension system (to which both employers and employees contribute and which is directly administered by the central government), an

interim grant-in-aid scheme for the support of elderly persons not covered in the national system, and certain other grants-in-aid for assistance to widowed women with children, blind persons, and other categories.

During the two decades when the use of the "spending power" through grants-in-aid and related measures was successfully meeting the constitutional challenge, the nature of the opposition was changing. In the early days federal aid had tended to appear mainly as a form of assistance to rural people. Not until 1934, for example, did the law permit federal aid for road construction within incorporated places. The emergency relief programmes of the depression period showed how great might be the stake of the urban masses in centrally supported welfare programmes. This urban identification was further strengthened by the long-term programmes of direct national-local collaboration through loans and grants for airports and subsidized housing in behalf of low-income families, for related schemes of slum-clearance, and, more recently, for even more comprehensive plans of urban reconstruction. These developments tended to offset the tendency of urban electorates to make common cause against the enlargement of national activities. Even though an increasing number of people became subject to the national income tax as the level of exemption was pushed lower, the higher and middle elements were likely to be especially restive under the burden. Nevertheless, the same interests were sensitive to the weight carried locally by the property taxes, which was partly relieved by grants-in-aid from higher levels.

Having spoken of the constitutional and political aspects of the "spending power" as applied in federal aid, we may proceed to certain administrative questions. By the middle of the century, more than forty schemes of grants-in-aid were in operation under laws of Congress. Altogether, about three and one-third billion dollars were passing yearly from the central government to the states and localities, mostly to the state governments which then became the channel; but sometimes, as in low-cost housing and airport construction, directly to municipal units. The total sum was about one-tenth of the combined revenues of the state and local governments. In some states with a low per capita income, however, more than a quarter of the state income might come in national grants-in-aid. Moreover, for the country as a whole, state aid to local governmental units was providing an even larger proportion of their total revenue.

Meanwhile many variations had appeared in the pattern of federal aid. The form that emerged after 1911 did for a time present certain almost standard features: (1) the authorization by law of the annual appropriation of a given sum of money for cooperation with the states in a specified objective; (2) the allocation of this sum among the states on some formula, stated in the act itself, based on population or some other presumed measure of need for the service in question; (3) the requirements that a state, in order to qualify for its allotment, should voluntarily associate itself in the programme by an act of its legislature and "match" the allocation by appropriating at least an equal sum. The controls took the form of the annual submission of plans (which, in the case of highways and other physical construction, might be the plans of individual projects) and central inspection, audit, the right to withhold funds, and, in some schemes, the requirement that, in the event of misuse, restitution must be made before payments were resumed. For grants in the field of social security, the law required that all personnel paid wholly or in part from central funds must be recruited by some form of merit system.

The foregoing pattern was subject to criticism on two main grounds, admitting the desirability of federal aid in general.

First, the grants had developed as the piecemeal products of enthusiasm for particular reforms in response to particular problems. The specified objectives tended to be relatively narrow even though the states might have leeway in the choice of methods. The possible effect might be a distorting influence upon the state budgetary provisions, as when the desire to qualify for the national grant for vocational education might lead to a neglect of other phases of education.

Second, so far as the grants were to serve as an equalizing device, this objective was inconsistent with certain features of the pattern. Thus the allocation of the total fund on the basis of a measure of need, like population, did not take account of variations in taxable wealth which would affect the ability of the several states to raise money for their share in supporting the programme. The "matching" requirement in itself, when it meant that the state must appropriate at least as much as the grant, reflected the administrative motives of stimulation, not the more distinctively economic objective of equalization. Yet the latter aspect of grants-in-aid was becoming increasingly important as its volume grew.

Against this background, it will suffice to mention certain corrective alternatives and tendencies.

First, as to the segregated nature of the existing grants-in-aid, one alternative would be to replace the system of conditional grants by an unconditional grant, allocated to the states on the basis of some master formula. But it can be argued that this type of solution sacrifices the administrative value of stimulation and guidance through functional relations in which the central office is as much a clearing house as a control point. Moreover, from the standpoint of keeping the total volume of grants within bounds, it can be argued that this objective is easier to maintain when each proposed grant must pass muster in terms of its relation to the national interest. Instead of resorting to an unconditional grant, it is possible to meet the criticism of the prolix system of numerous conditional grants by broadening the categories and by avoiding vexatiously detailed requirements. This line of solution was recommended by an advisory commission on intergovernmental relations which was authorized by Congress and which reported in 1956.

Second, as to equalization, it has already been demonstrated in the United States that the apportionment formulae can be made fairer by combining the factors of (*a*) need for the service and (*b*) financial capacity. Population is ordinarily a measure of need. For certain purposes, however, a more exact measure may be used, like the number of children of school age in connection with an educational grant. Moreover, it may be desirable to take account of the factor of relative sparsity of population in various localities, for this condition is likely to increase the unit costs of service. As to financial capacity, per capita income is a fairly satisfactory measure. Various federal aid schemes in the United States since 1946 have been recognizing this factor. An example of the way it works out is seen in the School Lunch Act enacted in that year. We may compare the allotments of two states of approximately equal population: A northeastern urban state with a per capita income of $1,671, received a bit more than two million dollars whereas an agricultural state in the South, with a per capita income of $659, received four million dollars. A further refinement in such systems of measurement would be to take account, not only of taxable capacity (crudely indicated by per capita income), but also of the degree of "fiscal effort" that is made by each of the governmental units in taxing itself. The ideal would be to insist upon an "equality of sacrifice" as a result of self-taxation up to this

limit. Grants-in-aid would be adjusted accordingly. A possible method of measuring the degree of sacrifice would be to devise a model tax system which would be applied statistically, thus revealing the amounts that could be raised by the various states under an identical scheme of taxation. A comparison of these amounts with the sums actually raised by the several states would indicate their relative positions with reference to the ideal form. By this method it would be possible to measure the relative sacrifice that was made by the states in the taxes that they imposed upon themselves.

In stressing the equalizing role of interlevel payments, I do not overlook the fact that the rectification should be sought, so far as possible, by raising to a more equal level the productive capacities and taxable resources of all regions and localities. In this spirit the Industrial Policy Resolution adopted by India in 1956 declared that "it is important that disparities in levels of development between different regions should be progressively reduced". However, the limits of this ideal are self-evident, not to mention the time that is needed even where eventual economic equality is attainable. Moreover, a compromise must often be struck between the ideal of equality and a proper specialization of areas. Experience indicates that in the long-run it is easier to balance conditions among regions than to erase disparities among localities within the same region. This stubborn fact will be a lasting challenge to fiscal policy.

Three underlying questions may be asked about the system of national grants-in-aid as a whole.

(1) How far is action through grants preferable to direct execution by the central government? In answer, I believe it can be said truly that, although the states are subordinated to some degree by participation in a joint endeavour under grants-in-aid, their long-run vitality is more likely to be preserved than would be the case if the central government conducted the activities directly. It is relevant here to note that in the United States since 1945 the total expenditures and employees of the state governments as a whole have increased more than the expenditures and employees of the central government who are engaged in all civilian activities not connected with defence, taking the latter in a broad sense. To be sure, this condition partly reflects the canalizing of effort through central grants-in-aid; it also reflects the extent to which the states have developed additional institutional and other facilities, absorbing at the state level activities that otherwise would be performed locally or not at all.

(2) How far is it possible and desirable to coordinate the functionalized relationships which are characteristic of the use of conditional grants? In answer, we have noted that a middle course can be followed between a system of unconditional grants, on the one side, and, on the other, the highly segregated grants-in-aid that are typical in the legislation of the United States. This desirable compromise can be achieved by broadening the functional categories and minimizing the restrictive conditions, consistently with responsibility for the main objective.

(3) Assuming that the conclusion on all such scores is favourable to the large-scale use of grants-in-aid in a federal system, what is the range of the device? What governmental activities are susceptible to treatment in this way? In answer, it must be said that under federal constitutions that do not provide for supervisory powers in connection with a system of indirect federal administration, and where the tradition is strongly on the other side, grants-in-aid are appropriate for programmes of public works and welfare. They are not applicable in the conduct of regulatory activities that involve the use of coercive state powers where the resistance of private interests must be overcome, where uniformity is important, and where the resistance is likely to be reflected in sectional rivalries. In such situations, to be sure, grants may be useful in supplementary ways, such as the support of cooperative enforcement when the policy is well established. The main control, however, must be central in point of impetus and continuing responsibility.

II

Broadly speaking, India has relied more heavily upon the device of shared taxes than upon conditional grants-in-aid in seeking to equalize financial resources among the states. The sharing of a tax may amount to an unconditional grant-in-aid and has an equalizing effect when the apportionment is upon the basis of some measure of need, like population, rather than the place where the tax is collected.

The Indian constitutional arrangements largely eliminate overlapping tax jurisdictions, such as exist under American federalism. The result, however (as K. K. Sharma remarked in his 1959 study of *Public Finance*, p. 409), is the fact that "a majority of the elastic sources of revenue is vested in the Centre". At the same time, the constitutional system entrusts important welfare and development functions to the states.

The methods for fixing the exact apportionment of shared taxes in India faintly resemble the flexibility of the Australian system as it has developed since the Thirties for handling certain aspects of central-state financial relations through an expert commission. In India, Article 280 directs that a Finance Commission must be formed every five years to make recommendations to the President regarding: "(*a*) the distribution between the Union and the States of the net proceeds of taxes which are to be, or may be, divided between them under this chapter and the allocation between the States of their respective shares of such proceeds; (*b*) the principles which should govern the grants-in-aid of the revenues of the States out of the Consolidated Fund." On the basis of the little I know, I am impressed by India's ability to use the guidance of an expert body in the ticklish field of federal finance. In view of the extent to which this question is close to the heart of developmental policy, I do not agree with certain critics who seem to ask for the Commission a degree of detachment, even of remoteness, that would be unrealistic and undesirable.

In distributing the proceeds of the Union-collected income tax, the formula recommended by the first Finance Commission assigned 55 per cent to the States, to be apportioned on the basis of 80 per cent for population and 20 per cent for collections. The second Finance Commission raised the State's share to 60 per cent, with 90 per cent based upon population. In the case of excises upon eight commodities, the State's share is 25 per cent, apportioned on the basis of population. Such facts justify the remark that in India there is a shift in inter-governmental transfers from the basis of origin or derivation to that of needs as a factor in the determination of central assistance.

The Constitution in Article 275 also contemplated "grants-in-aid of the revenues of such States as Parliament may determine to be in need of assistance, and different sums may be fixed for different States". Although conceived mainly as a residuary form of assistance given as unconditional grants, a tendency has existed not only to authorize loans for special development schemes but also to increase the number of special grants-in-aid. R. N. Bhargava, in a 1956 study of the *Theory and Working of Union Finance in India*, remarked that "the allocation of these loans has, in the past, depended upon individual bargaining".

As to the handling of grants, P. P. Agarwal, in his 1959 monograph

on *The System of Grants-in-Aid in India*, made the following suggestions:

> During the Second Plan period, the procedure adopted for assisting States, local bodies and voluntary organisations is being modified to a great extent. The introduction of Annual Plans which is bringing flexibility and re-thinking every year on the allied problems has been very helpful for evolving a system which could remove difficulties faced by different organisations seeking assistance. In order to give greater latitude to the States, the schemes are grouped under different heads, and the Ministries have enough scope for meeting the requirements of the States and to remove the handicaps facing them. In spite of these changes, there is still room for further improvement in the system. The Centre might assign broad priorities and allow the States to spend out of the sanctioned amounts on the items of developments in accordance with these priorities. At present, the States have to go by the pattern laid down by the Centre and they do not possess enough discretion to re-arrange their schemes. Such impediments might be removed and the Centre's function could be limited to supervise the expenditure and to see that it is incurred according to the priority laid down.

The same author points out that each State has its own method of allocating grants. He adds: "Though grants to local bodies have increased in recent years, the existing scale of assistance towards education, medical relief, public health, communication, etc. is inadequate. In contrast to the heavy dependence of the States on the resources of the Centre, the local bodies do not receive sufficient assistance which would enable them to carry out many responsibilities under the purview of their activities."

As to the present scale of the inter-level payments of various kinds, I note that Dr Sharma, whose book was published in 1959, used somewhat earlier figures when he observed (p. 427): "Since 1952, the resources made available by the Centre to the States through grants, loans and proceeds of divisible taxes constitute about half of the total expenditure of State Governments." He added: "Grants-in-aid account for less than 10 per cent of the State revenues." It may be assumed that the proportion will increase and raise some of the problems that have been noted in the United States, both in

connection with the functional proliferation of separate grants and also in devising methods of apportionment that, without sacrificing the administrative uses of conditional grants, will adequately recognize the objective of equalization.

The question of the basis of apportionment was raised sharply in a statement of the Union Education Ministry in March 1960 at a time when the outlines of the Third Five Year Plan were being discussed in preliminary form. After speaking of the scheme for universal primary and basic education, it said: "Now that it has been decided as a matter of high policy to take up this project, all the available resources of Central and State Governments, financial as well as technical and administrative, have to be pooled together to make it a success. This will also involve a careful re-examination of the basis on which Central assistance is to be given to the various states whose financial resources and educational development differ quite markedly—a point which is already under consideration in the Planning Commission. It is the unanimous view of the education working group that the allocation of Central grants to all States on a uniform basis, irrespective of their capacity to raise funds, will have to be modified if the existing disparities are to be removed—if indeed, they are not to become worse with each successive plan."

III

Some overall comments on Indian federal administration are in order as a personal reaction to expressions of doubt that I have heard in two directions. On the one hand, it is sometimes said that the situation has drained away the taxable resources, freedom of action, and the initiative of the states. On the other hand, the question is raised whether the needed vigour and consistency of administration can be assured in view of the extent to which plans for agriculture, community development, and welfare generally are dependent upon the states for their adoption and execution. Each of these complaints about federalism is at least a warning of its possible miscarriage. Each is in part a refutation of the other. In a complicated federal system, however, both charges could be true in a measure. I venture very diffidently to put down a few words of appraisal on each score.

From the standpoint of opportunity for initiative at the state level, I am favourably impressed by the extent to which the state governments in India participate in the planning process. It is true that

the overall framework is set by analyses prepared at the Centre. It is true that the major industrial and like investments are central in their auspices and control, in accordance with the Industrial Policy Resolution of 1948 as revised in 1956 and in line with the Industries (Development and Regulation) Act. Moreover, the Union government provides most of the financing of state construction projects that are in the five-year plans. The planning process itself is cumulative. For each new period it builds upon what exists or is under way. When a five-year plan is at an early stage, more than a year and a half before it is scheduled to begin, a letter of instructions is sent to the states. It indicates the objectives in broad terms, with provisional estimates; it invites each state to comment from the standpoint of what it would need to contribute appropriately to the overall goals.

At this stage, characteristically, a state sets up perhaps a dozen working groups of government experts, in some cases reinforced by private persons who have specialized knowledge. These groups confer on questions of priorities with the state ministers in charge of finance and planning. When the preliminary reports of these groups have been brought together they are sometimes presented for information and comment to a committee that may include (as in the case of Andhra Pradesh) representatives of the various political parties. Meanwhile there are informal contacts with the functional ministries at the Centre and with the Planning Commission directly. It is likely at this point that the state will know approximately how much financing it may expect to be allocated in the plan for the major types of development. In the light of these probabilities, pruning takes place through consultation between the working groups and the secretaries more specially concerned with planning and finance. The consolidated group reports in revised form are submitted to the council of ministers, sitting as a state committee on planning. On the basis of the agreement reached through these procedures, a number of state spokesmen present the state's views before the Planning Commission.

Thus the total process is circular, in a sense. It provides more than one occasion for the presentation of state views, apart from the opportunity for comments and requests which is partly reopened in a more specific way on the occasion of each annual budgetary round during the period of the plan. The main process invites the state agencies to reach an agreement among themselves which is accepted

by the state's political leadership. It remains open and tentative as to details until late in the process. Meanwhile the prospective state's requests and suggestions have been undergoing revision in the light of central reactions and some knowledge of the overall prospects and the financial limits of the plan as they apply to the state. In the end, the chief ministers of all the states sit, along with the members of the Planning Commission, in the National Development Council which as an advisory body discusses the consolidated national plan, including the Planning Commission's proposals for central schemes and for the private sector, before the Cabinet finally approves it for submission to Parliament.

I am aware that in carrying out construction plans (as for a state-supported project) more is involved than initial approval and financing from year to year. In some instances, the consummation may depend upon the availability of foreign exchange for the procurement of crucial equipment items. Thus the execution of an approved project may be contingent upon the separate judgment of the central officials who are in charge of foreign exchange. One hears complaints in this connection. It is evident, however, that the way is open for protests and adjustment at the Centre. It is usual for a project approved by the Planning Commission to be held up in order to allow a search to be made of domestic production possibilities before granting exchange for the importation of the equipment.

The central government is able, in a measure, to guide the development of private business through its licensing power under the Industries (Development and Regulation) Act of 1951. Its main and proper concern is with the development of the country's economy as a whole. It is not indifferent, however, nor could it afford politically to be indifferent, to the claims of the less developed areas industrially, as in southern India. I understand that the Centre is accustomed to consult the states before granting licences for establishments within their borders.

Turning to the question of the availability and use of taxable resources within the states, the complaint is widely heard that the central government has all the flexible, productive sources of revenue. So far as this statement applies to the income tax, it should be remembered that the states are given unconditionally sixty per cent of the yield, distributed mainly on an equalizing basis. This arrangement is in contrast with the situation in the United States where the central government's income tax is not shared as a tax, while (despite the

inherent difficulties of levying such a tax in the smaller governmental units) about half of the states impose income taxes of their own and a few derive a large part of their revenue from this source. In India—apart from the income tax which is shared—it is probable that in future years the states and localities will find that they have not been as ingenious and courageous as they may become in drawing upon resources within their reach. They should do this, not so much to replace central assistance in a time of rapid national development, but rather to go beyond it through the exercise of the kind of self-reliance and initiative that sees central support as a complement to state and local effort, not a usurping substitute for it.

I am conscious of the difficulties that lie in the way of drastic fiscal reform; it involves deep-lying and politically embarrassing issues of land ownership and assessment. Disregarding the earnings of public enterprises, the question of the adequacy of revenue has three aspects: the existence of the legal power to tax; the existence of wealth in taxable forms; and the will to tax it. The Indian states are limited in fiscal matters but they are not without power. Even amid the strains of transition, even against the background of heritages of poverty, the states have resources which they have not fully tapped.

Returning to the question of state participation in development, it is clear that the established conventions regarding the roles of the central and state governments in the planning process do not preclude the exercise of considerable state initiative in promoting industrial undertakings even when these lie within the fields of central responsibility. The State of Madras, for example, has sought to speed up the development of lignite resources within its area by explorations and technical studies at its own expense. It has sought to demonstrate the feasibility of commercial exploitation; it has enlisted foreign advice and experimentation in order to secure cost estimates that may show the practicability of steel production with the use of lignite. In pushing ahead in these matters and in bringing the evidence to the Centre's attention, the state department is interested in the development of industry in the southern part of the country. From the same standpoint it would like to show that the use of lignite for thermal power might so reduce the cost of electricity that aluminium production would be possible.

Looking at central-state relations from the other side—that is, the alleged risks of incomplete execution of national purposes as a result of undue dependence on the states under the Indian constitutional

system—I confess that I do not share this concern. The powers of the central government are extensive; its latent authority is even greater. In addition to the matters entrusted exclusively to it, and its paramount jurisdiction over the numerous items in the concurrent list if it cares to act, the central government has general residual power. In estimating the extent of the possibilities that are latent in this unusual feature of Indian federalism, the observer is aware that they are limited by the enumeration of state powers. Moreover, he remembers how in Canada the constitutional intention to strengthen the central government by reversing the classic treatment of residual powers in federal systems was frustrated by judicial decisions that gave an unexpected scope to certain of the delegated provincial powers, transforming them into far-reaching restrictions upon the central government. Nevertheless, the potentialities of central legislation in India, together with the checks upon the states through the prerogatives of the appointed governors, involve so wide a scope of possible action that from the standpoint of law-making, as distinguished from administration, the system approximates that of constitutionally decentralized unitary state. This can be said without taking into account the central government's expressly granted emergency power to set aside a state administration and to conduct the state's affairs during a period of readjustment.

Administratively, the situation is profoundly affected by the existence of the all-India services: specifically the Indian Administrative Service and the Indian Police Service. Despite proposals from the Centre the states have not agreed, and are not likely to agree, to the creation of additional all-India services. No use has been made of the opportunity opened by Article 312 which states: "If the Council of States has declared by resolution supported by not less than two-thirds of the members present and voting that it is necessary or expedient in the national interest so to do, Parliament may by law provide for the creation of one or more All-India services common to the Union and the States, and subject to the other provisions of this chapter, regulate the recruitment, and the conditions of service of persons appointed, to any such services." Despite the failure to take advantage of the permission thus granted to extend the system of All-India services, a unifying influence is at hand in the Indian Administrative Service through the allocation of its members to state cadres from which come the top career officials of the states and from which are also drawn members who fill positions in the

central Secretariat. This unifying influence is likely to survive even if the states, now reorganized on a linguistic basis, grow apart as cultural entities, as a result of movements that may be intensified by the possible tendency of the state universities and their affiliated colleges to conduct most of the instruction in the prevailing regional language.

IV

Professional and other groups, official and un-official, may profoundly affect the behaviour of a federal system. Typically, officials in functional fields under the state departments form country-wide and sometimes regional associations to advance their common interests in technical and other matters. Typically, too, the corresponding central officials are drawn into the association, although they may not be formal members. In any case, the relations are likely to be friendly; all are concerned in the protection and promotion of the function that is involved. It is not so easy to bring together the states as entities. To be sure, the Prime Minister's Conference in Australia has shown considerable vitality and influence. In the United States, after the relative failure of bodies like the annual Governors' Conference, the voluntary association called the Council of State Governments has been effectively active and influential on various matters from a state-level point of view. It is supported by state contributions and is linked to commissions on interstate cooperation in the several states. Typically these combine members of the state legislature and officials from the executive departments. The Council itself works through a permanent secretariat and various functional and regional committees that are formed for particular purposes. It also provides headquarters support to the Governors' Conference and a number of other associations of state officials. It collaborates with but has not displaced a hundred or more associations of state officers in technical fields. Fortunately, the Council's policies do not conflict with the principle of cooperative federalism although, wherever possible, it does seek to promote interstate collaboration in preference to national action.

In India conferences along functional lines are an active and important factor in its federalism. The groupings seem less subdivided and less formally organized as associations of officials than in the United States. On the regional level, the constitution as amended in 1956 provided hopefully for five zonal councils. The Union

Home Minister is nominated by the President as the common chairman. Each council is composed of the chief ministers of the states in the zone, who preside in rotation, and two other ministers from each state. Also in attendance as advisers without vote are a nominee of the Planning Commission and the chief secretary and the development commissioner of each state. For each council the Centre carries the costs of a headquarters secretary who cannot come from any state within the zone. The constructive possibilities that may be in these zonal bodies have not yet been demonstrated. At the centre, as we have noted, the combined political and administrative concerns of the states are represented by the presence of their chief ministers in the National Development Council.

In closing a word must be said about the role of party in India's federalism. Admittedly, the dominant position of the Congress Party in the states as well as the central government has facilitated the operation of a system in which the states are responsible for completing and carrying out important national purposes, including some in which the central impetus lies in advice and persuasion. Some critics of federalism wonder how the system will work if and when this cohesive force changes in the course of future political realignments. About this question it is risky to speculate in the light of the history of other federal systems; the Indian ingredients are unique. However, something can be said by way of reassurance regarding the chances of continuing collaboration in a federal system even when party control varies from state to state and, in addition, the reflex of the federal structure tends to decentralize the internal life of the national parties. Experience suggests that in free societies most policies of social welfare and economic development, after they have passed through a controversial stage, are accepted in the cumulative consensus of the nation. On this basis, they are extended by methods of advice and inducement that are not crucially affected by the variant politics of individual states in a federal system.

Part II

PROBLEMS OF DELEGATION AND AUTONOMY IN THE REGULATION OF ECONOMIC ACTIVITIES

CHAPTER VI

LEGISLATIVE DELEGATION OF DISCRETIONARY POWER

WE HAVE BEEN looking at decentralization from the standpoint of organizational theory generally. We conceded the need for integration. The need exists because governmental functions, within as well as among themselves, involve specialized activities that must be brought together. In a larger sense, the need arises from government's coordinating responsibilities in a modern society. It must essay what we have called a planning and equilibrating role even where the economy is largely conducted by private enterprise. However, our main stress has been upon the importance of decentralizing government in ways that increase the amount of initiative, at all levels and in all the parts, and the wilingness and ability of people to bear responsibility in this spirit.

Against the foregoing background, we turn to certain problems of delegation and of autonomous structure and procedure that arise in the public regulation or guidance of action in the private sector. It is appropriate here to indicate the flow of our inquiry. We shall begin by examining the implications of the rule of law from the standpoint of the legislative delegation of the types of discretionary power that seem necessary for the purpose of economic regulation and guidance. We shall then consider the scope and frequency of judicial review of the determinations made by administrative agencies in economic fields. This question is relevant to the theme of autonomy because an independent judiciary stands outside the administrative process. How can courts perform their safeguarding role without weakening the integral effectiveness of administration in handling complicated economic matters? The issues here merge in the problem of internal administrative substitutes for judicial review. Some of these arrangements involve elements of autonomy which must be looked at critically in the light of the institutional nature of administration. Finally, the logic of our inquiry leads us to look critically at the use of autonomous boards in regulating broad segments of a country's economy. It will be seen that a common thread runs through these different aspects of the regulatory process.

I

The noble concept of the rule of law is indeed protean but particularly it embodies two ideas that limit the delegation of legislative power: first, that government should act upon the basis of rules made in advance in the light of generalized conditions so that the rules can be applied in special situations without individual favouritism or malice; and, second, that the basic rules should be made by the kind of political organ that has the characteristics associated with the word "legislature". The essence is not in the name; it lies in the attributes that brought respect for the name. The characteristics are a numerous body of men, chosen frequently on a decentralized basis, proceeding by open debate, and embodying their decisions in a relatively stable and published form—the statute law. To bodies with these characteristics the liberal democracies in recent centuries have preferred, as a constitutional ideal, to entrust the making or at least the validation of the prime policy choices so far as they have not been made in a country's constitution.

It is men's belief in this location of power, in terms of virtues that lie in the mentioned characteristics, which is the deeper foundation of legal doctrines about the delegation of legislative power. But various superstructures of doctrine have been built, whether in the language of constitution, or in the meanings that courts draw from its spirit, or in the conventions of constitutional practice. We are asked to trace these doctrines as they affect the conduct of administration especially in the regulatory tasks with which we are concerned. I shall give particular attention to the United States. In that country, the nature of the federal system and the combined structural fact and legal principle called separation of powers give double support to the concept of a government of limited powers which are delegated to appropriate organs by a written constitution. This situation invites comparisons with India's experience under its constitution. Both countries afford somewhat similar examples of the accommodation of a doctrine, which is likewise an ideal, to suit the necessities of modern administration.

The following questions may be asked:

(1) In making laws, how much detail may the legislative body omit and leave to administrative discretion? This is the issue when there is an allegedly unconstitutional delegation of legislative power.

(2) Does the executive possess any constitutionally inherent

power to act in the absence of a statute? We shall consider this issue in relation to domestic affairs, not foreign policy.

(3) Looking at these matters from the reverse side, is there any limit on the kinds and degree of details that the legislative body has a constitutional right to put into a law? This is the issue if administrators complain that their constitutional domain is invaded when they are not allowed enough flexibility of action to carry out the laws efficiently.

(4) What are the limits on the right of the legislative body, or its organs, to participate directly in the execution of the laws?

(5) What special machinery within legislative bodies can safeguard the processes of delegation without crippling the legitimate administrative needs for leeway and prompt action? In view of the absence of any special organ in the United States Congress (apart from its system of numerous strong standing committees) it is interesting to compare the work of the Committee on Subordinate Legislation in India.

I shall consider these matters with reference to the United States before turning to analogous constitutional developments in India.

II

The United States Constitution declares in Article I that "all legislative powers herein granted shall be vested in a Congress". Article II begins by saying that "The executive power shall be vested in a President of the United States", and (in addition to certain duties which are specifically mentioned, as in appointing officers and negotiating treaties) it states that he shall "take care that the laws be faithfully executed".

Powers of the Legislative

May I recall the first question: in making laws, how much detail may the legislative body omit and leave to administrative discretion? The United States Constitution, as we have noted, declares that "all legislative powers" which are delegated to the central government are vested in Congress. Many state constitutions contain so-called distributing clauses which seek to emphasize in express language the underlying idea of the separation of three types of powers: legislative, executive, and judicial. In both nation and states one of the most frequent challenges to the constitutionality of laws is the argument that the statute in question is so broad in terms that it delegates legislative power.

But what is "legislative power"? Legislative bodies cannot put everything in the statute; some discretion must be left. The doctrine in the United States that legislative power cannot be delegated presented a dilemma that was bound to grow sharper as the tasks of government became more complicated.

The dilemma was largely avoided by the common sense of the Supreme Court. It was prepared from the outset to permit distinctions to be made. In 1825, Chief Justice John Marshall speaking for the Court in the case of Wayman *versus* Southard, suggested that there are two classes of legislative power: the first covering matters which are " strictly and exclusively " legislative in character, and these are for the legislative body only; the second covering all other matters, and discretion in handling these matters may be delegated. But the Chief Justice admitted that " the line has not been exactly drawn " and he added that " the precise boundary of this power is a subject of delicate and difficult inquiry, into which a court will not enter unnecessarily ".

Nor has the Court since defined legislative power in the abstract. Rather, in characteristically *ad hoc* fashion, it has escaped from the dilemma by treating as complete, free from any delegation of legislative power, laws in which Congress has sufficiently " indicated its will " (as the Court phrased the matter in the 1911 case of U.S. *versus* Grimaud), and has thus provided a standard or guide for those who carry out the legislative will.

But thus sensibly to remove the dilemma still leaves a difficulty: to decide in each situation whether the legislative body has completed the legislative phase of the process by making its intention sufficiently clear. As an inveterate constitutional issue, the phraseology of the United States Constitution has given an unusually technical turn to this problem. However, it exists under all forms of responsible government as a practical problem of judgment, alertness, and restraint, which must be elightened by vigilant sympathy toward the administrative process.

Two main types of supplementary executive action are possible. Sometimes the leeway given to the executive side of the government is to discover the existence of a condition of fact under which certain provisions of statutory law become operative. Sometimes the leeway is in forming a body of regulations that project the requirements of the statute. The first type may be described as " contingent " delegation, although the Indian courts prefer the word " con-

ditional". The second type is described as "subordinate". V. N. Shukla, in his *Commentaries on the Constitution of India* (second edition, 1956, p. 287), remarks that "the distinction between the two types is said to be based on the point of discretion. In contingent or conditional legislation the delegation is fact-finding and in subordinate legislation it is of discretion."

In the constitutional development of a workable doctrine in the United States, the contingent or conditional type was illustrated in a landmark case that arose out of an act of Congress in 1810. This law renewed the so-called Non-Intercourse Act of the preceding year, subject to the proviso that if either France or England modified its orders so as not "to violate the neutral commerce of the United States", the Non-Intercourse Act was not to apply to that country. President Madison on November 2, 1810 proclaimed that France had so modified its orders. The Supreme Court later upheld the legality of this conditional sort of procedure in the case of the Cargo of the Brig Aurora *versus* the U.S.

A subsequent major test of the principle came in 1892 in the case of Field *versus* Clark. Here the Supreme Court upheld the constitutionality of a provision of the 1890 tariff act. The act placed certain commodities—sugar, molasses, coffee, tea, and hides—on the free list but it also specified duties on them which would take effect on the President's finding that the countries sending these things to the United States were imposing on exports from the United States duties which the President deemed "to be reciprocally unequal and unreasonable". This situation involved the taxing power; legislative bodies and courts have been particularly reluctant to permit delegation in this realm. The fact that the alternative rates of duty were set down in the law itself made it easier for the Supreme Court to uphold the act. It reconciled the flexible arrangement with the old doctrine, which it restated in the following words: "That Congress cannot delegate legislative power to the President is a principle universally recognized as vital to the integrity and maintenance of the system of government ordained by the Constitution."

A fuller test came with the upholding in 1928 of the flexible tariff procedures which (expanded later in the so-called "trade agreement programme") became a seemingly permanent feature of American public policy. The original law said that the President, on the advice of the Tariff Commission, might change any duty upwards or downwards to take account of changed costs of production at home or

abroad, provided that the amount of the increase or decrease was not greater than one-half of the duty set in the act. Chief Justice Taft, speaking for the Supreme Court in the case of Hampton and Co. *versus* U.S., expressed the classic formula on delegation: "If Congress shall lay down by legislative act an intelligible principle to which the person or body authorized to fix such rates is directed to conform, such legislative action is not a forbidden delegation of legislative power."

After this decision it seemed unlikely that any act of Congress would ever be declared invalid because of alleged delegation of legislative power. No national act, indeed, had been invalidated on this ground despite endless challenge; state legislation had not fared so well. In 1935, however, the Supreme Court administered a stiff warning to Congress. By a decision in January (Panama Refining Co. *versus* Ryan) it invalidated as an illegal delegation of legislative power a section of the National Industrial Recovery Act of 1933 that authorized the President to stop interstate shipments of oil produced in violation of state laws. Then in May (in the case of Schecter Poultry Corporation *versus* U.S.) it struck down the whole act, in part because it sought to stretch the "commerce power" too far, but in part because the President's authority to promulgate industrial codes was not sufficiently guided by standards in the law. The case involved the code for the live-poultry industry, a very minor affair among the six hundred codes that had been drawn up in consultation with the industries involved. Justice Cardozo (who had dissented in the earlier case on the ground that the President's power to curb inter-state petroleum shipments in support of state controls was not "unconfined and vagrant") concurred in the second case because the code-making authority in the act was (as Justice Cardozo put it) "delegation running riot" and was in effect "a roving commission to inquire into evils and upon discovery correct them".

For a time a cloud seemed to hang over much legislation, existing or proposed. This cloud soon lifted, however. The Supreme Court has not repeated the rebuke of 1935 although the argument that legislative power has been illegally delegated continues to be raised before the Court in many cases. In part, the Court's forbearance on the question of delegation has been made easier for the Court by more careful draftsmanship in Congress, taking care to give the rationale of each piece of legislation and to embody an "intelligible principle" as a guide to executive discretion.

It should be said in conclusion that the doctrine which forbids the delegation of legislative power has not been the cause, in any major degree, of the relatively detailed nature of legislation in the United States. Rather, this characteristic has been in part a reflex of the fact, that the executive is independent of the legislature, which is tempted to exercise remote control through statutory strings. In addition, detailed legislation has been consistent with the piecemeal character of legislative dynamics in the United States where multiple reform pressures interact with diverse administrative agencies and legislative standing committees. The synthesising role of the chief executive offsets these tendencies only partially. Meanwhile, however, sheer necessity forces an increasing delegation of guided discretion. In no field is this fact more apparent than in the economic controls with which we are concerned in these chapters. The Supreme Court in the case of Yakus *versus* U.S., in 1944 (upholding an emergency price-control act) remarked: "The Constitution as a continuously operative charter does not demand the impossible or the impracticable."

Powers of the Executive

We are led to our second question: Does the executive possess any constitutionally inherent power to act in the absence of a statute? The rule of law as understood in the liberal democracies says no. But the answer needs some qualification. Even John Locke, proponent of legislative supremacy, assumed that there was a power, other than the legislative and executive power, to deal with foreign affairs; this power he quaintly called the federative power (from *foedus*, meaning treaty). He observed that this power is necessarily exercised by the executive. Locke also spoke of executive prerogative in emergencies. I am not concerned here with foreign affairs as such. It happened that most of the historical situations in the United States that have raised the question of the President's power to act outside the statute law, or in advance of the passage of a law, have been connected with war or conditions approximating or related to war. This remark applies to actions of Thomas Jefferson, Abraham Lincoln, Woodrow Wilson and Franklin D. Roosevelt.

The remark also applies partially to the action by President Truman in the spring of 1952 that led, in the so-called Steel Seizure Case (Youngtown Sheet & Tube Co. *et al. versus* Sawyer), to the Supreme Court's outstanding if somewhat ambiguous pronouncement on the question of inherent executive prerogative. At the time fighting was

still going on in Korea and, apart from that, the United States was in the midst of the semi-mobilization of what had come to be called the Cold War. Nevertheless, the majority decision of the Supreme Court rested upon broader grounds. It was couched in language that is likely to mark the case as a landmark in Constitutional interpretation. For this reason it is worth-while to give some background and to quote from the majority opinion.

In the steel industry the unions and the managements were deadlocked over the terms of a new collective agreement. A strike was originally called for December 31, 1951, but was postponed. Agreement still failing, the strike was finally ordered for April 9, 1952. On April 8 the President by executive order directed the Secretary of Commerce to assume control of the steel plants and to keep them in operation pending a settlement. On the next day the President sent a message to Congress, saying in part: "I took this action with the utmost reluctance . . . the only way I know of, other than government operation, by which a steel shutdown could be avoided was to grant the demands of the steel industry for a large price increase. I believed and the officials in charge of our stabilization agencies believed that this would have wrecked our stabilization program . . . government operation for a temporary period was the least undesirable of the courses that lay open." The President also said: "It may be that the Congress will deem some other course to be wiser." It should be noted that the President did not portray what he had done as an extra-legal but necessary action that he was seeking Congress to validate. Rather, he said: "On the basis of the facts that are known to me at this time, I do not believe that immediate Congressional action is essential; but I would, of course, be glad to cooperate in developing any legislative proposals which the Congress may wish to consider."

Congress took no action then nor did it act later when the President sent a second message. The companies brought suit to prevent the Secretary of Commerce from going ahead with the seizure. A temporary injunction was granted. The workers went on strike and most of the steel plants of the country closed and, as things turned out, the production of steel stopped for months. The case was hurried up through the courts, argued by the Supreme Court on May 12, and decided on June 2, 1952. In addition to the main majority opinion which upheld the injunction and thus ruled against the President, five separate concurring opinions were written, while two justices

joined Chief Justice Vinson in a dissenting opinion that sought to uphold the President's action.

In ruling against the President, the main majority opinion began: "We are asked to decide whether the President was acting within his constitutional power when he issued an order directing the Secretary of Commerce to take possession of and operate most of the Nation's steel mills. The mill owners argue that the President's order amounts to law-making, a legislative function which the Constitution has expressely confided to Congress and not to the President. The Government's contention is that the order was made on findings of the President that his action was necessary to avert a national catastrophe which would inevitably result from a stoppage of steel production, and that in meeting this grave emergency the President was acting within the aggregate of his constitutional powers as the nation's Chief Executive and the Commander-in-Chief of the Armed Forces of the United States." This wording posed the issue as the question of the existence of a constitutionally inherent Presidential power to act sometimes without a basis in statute law. The majority decision, by holding that the President's attempted action was invalid, discouraged the view that there is such a prerogative.

I use these qualified terms in describing the significance of this important case because some laws did exist that bore at least indirectly on the situation. The minority of the Court, who ridiculed the majority view as a "messenger-boy concept of the office" of President, nevertheless made much of the existence of relevant legislation, including a defence mobilization act passed after the outbreak in Korea. Thus did they seek to base the Presidential action indirectly upon the spirit and implications of existing statute law. The historic significance of the majority opinion lay in its warning to executives that the basis must be direct, not indirect. This is a salutary principle.

Legislative Details into a Law

Now we must look at the other side of the shield in facing our third question: is there any limit on the kinds and degree of details that the legislative body may put into a law? The question has important bearings on the administrative process. Too much detail, or detail of certain kinds, may destroy flexibility in suiting the means to the end and may thus prevent the efficient execution of the law. If this happens it can be argued that the law-making body has gone beyond

"legislative power", and has invaded the field of executive competence. But will courts adopt this view and protect executive power and the flexibility of the administrative process by invalidating laws that are unduly loaded with details or certain details of certain kinds? The short answer is that they have never done so and probably will never do so.

In the United States this negative conclusion is reinforced by noting the case of U.S. *versus* Lovett in 1946. Here the Supreme Court did invalidate an item in a legislative act, but the case was significant precisely because it was neither argued nor decided on the ground that there was an invasion of executive power. Congress had inserted in an appropriation act a proviso saying that no money under that or any other act could be used to pay the salaries of three civil servants who were identified by name, unless before a certain date the President submitted their names to the Senate and got its approval. The President believed that the proviso was unconstitutional but he did not care to veto the entire appropriation act. The controversy went to the courts. Some people believed that such a detailed proviso could be attacked as an intrusion upon executive power. However, the matter was not presented to the Supreme Court on that basis. It was argued and decided by the Court in favour of the three individuals, that the provision was invalid because it was a "bill of attainder"—that is, a legislative act inflicting punishment without trial—specifically forbidden by the United States Constitution.

So to hold was indeed important but not a precedent that protects the executive branch against an excess of detail in legislative acts. The executive's main and indeed almost sole protection is the self-restraint of the legislative body. This restraint rests in part upon a sympathetic understanding of the administrative tasks of modern government.

In what has been said, I do not intend to imply that a statute law should say nothing about the administrative method by which the enactment is to be carried out. Durga B. Basu, in the third edition of his notable *Commentary on the Constitution*, published in 1955, properly remarks (I, 408) that in a modern state "the function of the legislature does not consist simply of law-making. In formulating a policy, it has to determine how the policy shall be carried out, by whom and how funds shall be available for the purpose." Some aspects of structure and procedure so vitally affect the legisla-

tive purpose that they are part of the purpose itself. A phase of the art of law-making is to recognize and provide for this crucial minimum, guided by the understanding of administration to which I have referred.

Limits of Legislative Participation

We are led logically to our fourth question: the limits on the right of the legislative body, or its organs, to participate directly in administration.

Looking at the question broadly, from the standpoint of the theory of responsible government regardless of constitutional form, we may say that a popularly elected legislative body, which intentionally is the product of fluid politics through a decentralized method of choice, should fuse policy as a collective organ—acting when necessary by majority decision. When it has projected its will in statute law and appropriations, it should confine itself to supervision, not participation. Details it could handle only through parts of itself, perhaps single members, or at most small committees. To act in this partial way would be a denial of the collectivity of judgment which is the essence of its nature as a numerous legislative body.

When we pass from the foregoing general statement to situations in different countries, over-all generalizations are hardly possible. Each constitutional system, however, does throw light upon practices under the others. The situation in parliamentary government is brought into perspective by noting the legal aspects of this matter under "separation of powers" in the United States.

First, as to appointments, the Constitution stated that officers of the United States must be appointed by the President with the advice and consent of the Senate; minor officers may be appointed by the President alone or by the heads of departments, as Congress by law may determine. The Supreme Court ruled (in the 1852 case of U.S. *versus* Ferreira) that Congress itself cannot name an officer of the United States. But no decision of the Court has supported the view expressed by President Monroe in 1822, when he said: "... it is my opinion that Congress has no right under the Constitution to impose any restraint by law on the power granted to the President so as to prevent his making a free selection of individuals . . . from the whole body of his fellow citizens." This view has doubtless been the common attitude of Presidents, whether expressed or not. In practice, however, it has been disregarded by Congress which has repeatedly

limited the President by specifying specific occupational and other qualifications for particular positions. It is a dubious practice. Nevertheless, it must be added that if President Monroe's view had been followed literally and completely, it would have precluded the establishment of a merit system of recruitment to the public service of the United States.

Second, as to removals, the Constitution was silent. The scope of the President's removal power was a main subject of debate in the first Congress when the original departments were created. The statutes, however, were silent on the matter; this fact doubtless reflected the prevailing belief that the President's removal power should not be restricted. The question remained a subject of recurrent controversy, flaring up during periods of acute strain between the executive and legislative branches of the government. Belatedly in 1926 (in the case of Myers *versus* U.S.) the Supreme Court invalidated a long-standing provision that required the consent of the Senate for the removal of postmasters. The Court held that the unrestricted scope of the President's removal power was implied in the silence of the Constitution, taken in conjunction with its direction to the President to "take care that the Laws be faithfully executed". Chief Justice Taft's long opinion was a monument of historical documentation to show what was intended in the Constitution. But the reader senses that the writer of the opinion also drew upon his earlier rich executive experience as commissioner-general of the Philippines, as Secretary of War, and as President of the United States, in knowing what is involved in the discharge of administrative responsibility for large undertakings.

In the same spirit, some years later, the Supreme Court declined to upset President Roosevelt's removal of Arthur Morgan as a member of the board of the Tennessee Valley Authority although the law had provided for removal of board members only by concurrent resolution of Congress.

Meanwhile, however, the Court had qualified the doctrine of unlimited Presidential removal power. In 1935 (in the case of Humphrey's Executor *versus* U.S.) it held that a member of the Federal Trade Commission could be removed only after a showing of cause, since the statute specified that the Commission members could be removed by the President "for inefficiency, neglect of duty, or malfeasance in office". Such a restriction was proper, the Court said, where the agency performed delicate semi-legislative and semi-judicial

functions. The " nature of the office " determined whether it was constitutional for Congress to specify the grounds of removal. This qualification of the main doctrine was no doubt sensible. It left the situation reasonably flexible, depending upon the nature of the office. The Court renewed the precedent in a 1958 decision (Wiener *versus* U.S.) that dealt with a semi-independent body for the handling of war claims. The Court remarked that, in the light of the purpose in view and the wording of the statute, it must " be inferred that Congress did not wish to have hanging over the Commission the Damocles sword of removal by the President for no reason other than that he preferred to have, on that Commission men, of his own choosing".

Third, the question of participation is raised in connection with the membership of legislators on joint bodies that perform executive tasks. In at least two cases in the United States, high courts have invoked the idea of separation of powers to prevent such arrangements. In 1928 the Supreme Court by a divided vote (in the case of Springer *versus* U.S.) invalidated an act of the Philippine territorial legislature which sought to vest control of the Philippine National Bank and of a government-owned company in the hands of a committee composed of the Governor-General and the presiding officers of the two legislative chambers. At almost the same time the highest court of New York State (in the case of People *versus* Tremaine) invalidated, as contrary to separation of powers, a provision which said that the chairmen of the finance committees of the two legislative chambers should sit with the Governor in allocating lump-sum appropriations. These were isolated but possibly significant decisions. On the legal side, they may be used in the future as rallying points of executive defence. On the other side, however, stand numerous unchallenged situations in which legislators serve upon boards and in which committees by law participate in the making of administrative decisions. Presidents may grumble; they may occasionally strike with a veto. But such situations seldom get to the courts. By way of comparison, W. H. Morris-Jones, in his 1957 study, *Parliament in India*, noted that in a recent year members of Parliament were serving on at least thirty boards, not all of which were merely advisory in nature.

It is the political process, not the judiciary, that mainly shapes the working relations between the branches of government. In part, at least, this process responds to ideas about the requirements of orderly administration, in which large elements of discretion must be

conferred and should be handled under conditions that are as free as possible from distorting influences.

Problem of Statutory Delegation in India

Our final question about the possibility of machinery within the legislative body to watch over the acts of delegation may well be merged in a discussion of the problem of statutory delegation in India. It is in that connection that it is appropriate to comment on the work of the Committee on Subordinate Legislation. No such concerted attention is provided for in the United States. Rather, the responsibility is implicit and diffused; it does not require routine scrutiny and reports. It is shared among the standing legislative committees in each of the houses of Congress, which under the terms of the Congressional Reorganisation Act of 1946 are directed to exercise a kind of oversight as to the workings of the administrative agencies that lie within the fields of their legislative jurisdiction. It is shared also with the Committees on Government Operations in both the chambers, which in roving fashion perform a distinctively supervisory role. Certain joint bodies like the Committee on Atomic Energy also exist. All of these committees are now served by professional staffs, wholly separate from the civil service but constantly in touch with it on matters that come up for inquiry. In these circumstances, when proposals have been made from time to time for committees or a joint committee to pass systematically on rules and regulations issued pursuant to law, the auspices have been such that the proposals have seemed to be aimed in hostile spirit at administration itself. This fact, however, does not dispose of the question of safeguards in the conferral and exercise of delegated powers. It does not deny the constructive role performed by permanent scrutinizing committees under the conditions of Cabinet government in England and in India.

III

Drawing as background upon our survey of the problem of delegation in the American constitutional system, it will be enough to summarize the analogous doctrines in India. What has been said has added relevance because the Indian courts have followed a line of reasoning which is parallel to that in the United States. Professor Basu, in the treatise I have cited; remarks (I, 106) that, although the Indian constitution does not expressly vest the legislative power and the judicial power in the legislature and in the judiciary respectively,

the Indian Supreme Court " in effect imported the essence of the modern doctrine of Separation of Powers, applying the doctrines of constitutional limitation and trust ". The formal difference is that in India, unlike the United States, one can speak candidly of subordinate *legislation*. The essence of the doctrine is the same.

V. N. Shukla, in the commentaries I have mentioned earlier, calls attention to the leading Indian precedent on the limits of statutory delegation. The case of *in re* Delhi laws, etc. (AIR 1951 S.C. 332) involved the question whether a regulation could, under an act of delegation, change the provisions of a pre-existing law. The author summarizes the gist of this and other cases by saying: " It is now settled, that there is a limit beyond which delegation may not go. The limit is that essential powers of legislation cannot be delegated. The essential legislative functions consist in the determination of a choice of the legislative policy and of formally enacting that policy into a binding rule of conduct. The legislature, therefore, may not delegate its functions of laying down *legislative policy* to an outside authority, in respect of a measure and its formulation as a rule of conduct. So long as a policy is laid down and a *standard* established by statute no constitutional delegation of legislative power is involved in leaving to the executive the making of subordinate rules within prescribed limits and the determination of facts as to which the legislation is to apply."

In amplification, the author quotes Chief Justice Mukherjee in the leading case, who said: " The policy may be particularized in as few or as many words as the Legislature thinks proper and it is enough if intelligent guidance is given to the subordinate authority. The court can interfere if no policy is discernible at all or the delegation is of such an indefinite character as to amount to abdication, but as the discretion vests with the Legislature in determining whether there is necessity for delegation or not, the exercise of such discretion is not to be disturbed by the Courts except in clear cases of abuse."

The control by the Committee on Subordinate Legislation is of a different sort. The Committee was first nominated by the Speaker in 1953. The idea of creating such a body had been broached as early as 1950. Needless to say, special attention was given to experience in the United Kingdom, including the findings of the Lord Chancellor's Committee on Ministers' Powers and the subsequent creation of the House of Commons Committee on Statutory Instruments. The Indian counterpart was originally a body of ten, later raised to

fifteen. It is authorized to appoint sub-committees and to require the attendance of persons and the furnishing of papers.

In connection with its duty to see and to report to the House whether the powers delegated by Parliament have been properly exercised within the framework of the statute delegating such powers, the Indian Committee on Subordinate Legislation examines each order and reports on the following aspects:

(*i*) whether it is in accord with the general objects of the Act pursuant to which it is made; (*ii*) whether it contains matter which in the opinion of the Committee should more properly be dealt within an act of Parliament; (*iii*) whether it contains imposition of taxation; (*iv*) whether it directly or indirectly bars the jurisdiction of the courts; (*v*) whether it gives retrospective effect to any provisions in respect of which the Act does not expressly give such power; (*vi*) whether it involves expenditure from the Consolidated Fund or the Public Revenues; (*vii*) whether it appears to make some unsound or unexpected use of the powers conferred by the Act pursuant to which it is made; (*viii*) whether there appears to have been unjustifiable delay in the publication or laying it before Parliament; and (*ix*) whether for any reason its form or purport calls for any elucidation.

The volume of the Committee's work is illustrated in the fact that in the closing four months of 1959 it held three sittings and considered one hundred and thirty new orders. In examining the Committee's reports I am especially interested in the extent to which the Committee discharges its role through an interchange of views and counsel with the ministries, sometimes urging them not to delay in issuing the regulations called for by a recent law, sometimes in receiving an assurance that certain changes or conditions suggested by the Committee will be included in a future revision of the regulations.

The direct jurisdiction of the Committee does not extend to regulations issued at the state level even when they are connected with the administration of laws of the central government. As to these, the Committee in its report in December, 1959 recommended that "the State governments be requested to have laws enacted by their legislatures to provide for the laying of the rules framed by them under a Central Act before the State Legislatures and for their modification, if any, by the respective legisla[illegible]".

Looking generally at the work of the Committee on Subordinate

Legislation, I assume that its effect is constructive. I say this for India despite what I have remarked earlier about the fact that in the United States no such organ has been created in the face of the existence of a system of standing committees for legislative proposals and incidental oversight within broad fields of legislation, for appropriations, and for investigations in the operations of the government generally. To be sure, the problem of responsibility in the use of delegated discretion has many phases; only part of such discretion appears in the form of regulations that are suitable for legislative scrutiny and comment. Nevertheless for all countries the experience of bodies like the Indian Committee on Subordinate Legislation will have suggestive value.

CHAPTER VII

ADMINISTRATIVE ACTIONS AND THE LIMITS OF JUDICIAL REVIEW

THE PRECEDING CHAPTER dealt with the relation of legislative bodies to administration. Here we are concerned with the relation of courts to administration in regulating economic activities. As we have remarked, an independent judiciary stands outside the administrative process. It deals with that process autonomously. A crucial factor in effectively responsible administration is the recognition on all sides of the proper limits of judicial review of administrative actions.

A. T. Markose begins his 1956 treatise on *Judicial Control of Administrative Action in India* with a trenchant observation: "Owing to the intricate and complex system of Government that exists in a modern State and the vast extension of social legislation that has taken place in modern countries including India, an unprecedented growth of the administrative process has taken place." The author, as a student of jurisprudence, soundly indicates the gravity of the results for his own field of learning when he adds: "The problems arising out of this development have become the most important issue of law at present because they have affected many aspects of the legal system."

I would not be competent to deal with the technical phases of these problems, even if they were germane and within the compass of the present brief treatment. The outlines and motivating forces of the relations that are involved cannot be disregarded by the student of administration. Least of all could he afford to overlook them when he is dealing with the public regulation of economic activities. It is necessary to examine the rise of modern systems of administrative determinations and to consider how judicial review as a phase of the rule of law can be accommodated to the necessities which are inherent in this development.

I

A traditional view of the rule of law from the administrative standpoint was notably summarized in 1885 by the English jurist, A.V. Dicey, in his treatise on *The Law of the Constitution*. "We mean",

Dicey wrote, " that no man is punishable or lawfully can be made to suffer in body or goods except for a distinct breach of law established in the ordinary legal manner in the ordinary courts of the land."

In this classic statement of the traditional doctrine two phrases stand out: " distinct breach of the law "; and " established in the ordinary legal manner in the ordinary courts ". The sentence as a whole gives the background against which to consider the tendencies of law-making in a technological age, accompanied by administrative determinations under broad statutes and a demand for a large measure of administrative finality.

In tracing the administrative developments that are the background of our problem, it is beside the point to speak of the tendency through the nineteenth century and later to establish specialized inspectorates to aid in the enforcement of laws on matters like sanitation, working conditions, and the like. This development was notable indeed; it contributed to the rise of the original welfare ministries in fields like health and labour. Nevertheless, except in situations like the summary abatement of nuisances, the ultimate method of enforcement was unchanged; it remained directly dependent on the courts. The inspectors, to be sure, can accomplish much through education, persuasion, and warning. However, if there is a violation of the law, the inspecting department reports it as a complaint to the prosecuting official who then proceeds in the courts. Of course, some discretion is left to both the inspector and the prosecutor. Sometimes the law expressly provides for the exercise of judgment in such situations. For example, the United States law which seeks to protect the purity of foods, drugs, and cosmetics says that it shall not be interpreted " as requiring the Administrator to report for prosecution, or for the institution of libel or injunction proceedings, minor violations... whenever he believes that the public interest will be adequately served by a suitable written notice or warning".

Our main concern is with the more important and troublesome field of administrative determinations which are issued under the authority of broadly phrased statutes and which have the force of law in themselves unless they are successfully challenged in the courts by those whose conduct they seek to regulate.

The spread of this device was due in large part (as Ernst Freund remarked in his 1928 treatise on *The Administrative Control of Persons and Property*) to " the inability of the legislature to formulate standards sufficiently definite for private guidance ". More-

over, it is a procedure that is suitable when the conduct that government is seeking to restrain or guide does not involve actions which are wrong in themselves in a criminal sense; they are actions which have anti-social consequences in the context of particular sets of circumstances. The concept of a " distinct breach of the law " does not fit this type of control. Still less does it fit when the nature of the control is developmental as well as preventive. Even in the nineteenth century, in the face of complicated economic and technological facts and competing interests, legislative bodies found themselves unable to go beyond a broad statement in the law that (for example) the rates charged by privately owned railroads should be " reasonable " and " non-discriminatory ". They left it to administrative bodies to work out the fuller meanings of these words in making " determinations " in particular situations. The action might take the form of an order permitting an increase of freight rates by a specified percentage or requiring that the charge for shipments to a particular locality should be lowered because the existing rate was discriminatory in its effect upon the competitive relations of businessmen in different places.

The types of action now covered by the phrase " administrative determinations " cannot be classified in a completely satisfactory way. This difficulty is natural. The system arose in response to the intricate, technical, socially involved, and endlessly varied situations with which modern legislation was attempting to deal. Anglo-American writers often distinguish three main kinds of administrative determinations: " directing orders " ; " enabling orders " ; and " awards ".

" Directing orders " require some change in existing behaviour. We have already given an example in speaking of an administrative order that requires a railroad company to change its rates. This is a relatively simple illustration in comparison with the diverse kinds of intervention that fall within the range of directing orders.

" Enabling orders " give advance permission to do something. The permission takes many forms and goes under many names, such as " licence ", " permit ", " certificate of public convenience and necessity ", " approval ", and others. The use of licences is old. The variety of their use today is shown in three examples. In India the development of the private sector is partly guided by the issuance of licences, required for all except small businesses under the Industries (Development and Regulation) Act of 1951. In the United States, the Federal Power Commission (on the basis of applications which

it receives) gives licences to construct and operate hydro-electric plants on rivers that are subject to the jurisdiction of the central government. In choosing among applicants, the law directs the Commission to give preference to public authorities like states and local bodies. In any case, the licence sets certain conditions of construction and operation, including observance of the statutory requirement that the rates and the standards of service in the sale of electricity shall be subject to regulation either by a state body or (in the absence of state provision for such control) by the Federal Power Commission itself. The third example is the issuance by the Federal Communications Commission of licences to construct and operate radio broadcasting and television stations. The Commission usually must make a delicate and often difficult choice among several applications, since the number of available "channels" or "frequencies" is limited. The licence is given upon the basis of the Commission's judgment that the recipient meets the standards which are stated in the law, including the main standard of "public interest, convenience, and necessity". Such a licence is for a limited period; it specifies the "channel" or "frequency" that is to be used, the strength of the station in kilowatts, and the hours of the day or night during which the station may operate—that is, if it is required to share the same "channel" locally with other stations.

The nature of "awards"—the third main category of administrative determinations—is shown by two examples. In the United States a shipper may complain to the Interstate Commerce Commission that he was over-charged by a railroad on a particular shipment, perhaps because the railroad wrongly classified the goods under the complicated rate structure which prescribes different rates for different kinds of materials, also varying with the volume of the shipment. If the Commission concludes that the complaint is justified, it issues an "award" in favour of the shipper which requires the railroad to repay part of what the shipper has paid. The second example is in the field of workmen's compensation for injuries suffered through accidents in the course of their work. In common-law countries the modern administrative system of workmen's compensation has replaced the traditional method of lawsuit for damages brought by the injured man against his employer. In handling such cases, the courts originally had drawn their principles from the law of negligence. In applying it, they attached three limiting doctrines: that a worker when he took a job was understood to assume the normal risks of that

kind of work; that the employer was not liable if the fault was that of a fellow-worker; and that, even in the event of negligence on the employer's part, he was not liable if the injured workman had been at fault himself, and thus had contributed to the negligence. It is true that in the evolution of the law, the courts were modifying these limiting doctrines, and in many places the process of adaptation was being hastened by statutes on employer's liability which broadened the grounds on which the injured workman might sue a negligent employer in the courts for damages. Regardless of such liberalizing changes, however, this judicial process was deemed to be clumsy, unfair, and basically unsuited to industrial conditions, in which the risk of injury is an incident of employment which should be treated as one of the costs of operation. Accordingly, most modern laws on workmen's compensation have two features: first, the establishment of an administrative agency which makes an "award" to the injured worker; second, the requirement that every employer shall carry insurance out of which the award will be paid. These provisions spread the risk; the cost of insuring against it becomes a normal cost of doing business in the industry in question. The use of an administrative determination, the award, is intended to avoid expensive, slow court proceedings.

It happens that the board form of organization is used in the examples drawn from the United States to illustrate the three main types of administrative determinations. The connection is not necessary. To be sure, a natural tendency exists to resort to boards or commissions in handling the combined elements of sub-legislation and of adjudication that are involved in systems of administrative determinations. We shall examine this tendency in a later chapter; it raises important structural problems in administering economic regulation. Here our concern is with judicial review of administrative determinations. It involves considerations that are largely distinct from matters of structure, except in the sense of the primary structural fact of the separation of the courts from the executive organs of government.

II

In examining the extent of administrative finality, we are speaking of administrative actions that are directly coercive. It is true that some of the most important administrative actions are not susceptible to judicial control. Such, for example, is an order of the Federal Reserve

Board in the United States to raise or lower the re-discount rates, which may have profound effects upon the whole economy and different intermediate effects upon particular interests. Likewise, administrative choices in fields as different as public works, price-supporting purchase plans, or beneficial welfare programmes are seldom subject to court review; the correctives, if they are needed, lie almost wholly within administration. This fact helps to give perspective to the role of judicial review in general. It does not lessen the importance of the relations of courts and administrative agencies in the extensive regulatory domains to which judicial review is applicable.

I am interested to note that the author of the distinguished treatise on Indian administrative law from which I have quoted believes that "today in India the need for judicial control is perhaps at the maximum". He properly urges that Indian courts should be attentive to the development of their own fundamental law, while not unmindful of precedents in other countries. His own treatise draws heavily on English cases. It could be fortified, if that were necessary, by looking to the United States, where the "aristocracy of the robe" (as John Burgess admiringly described the relatively great power of the courts in American affairs) was traditionally attended by unusually extensive and rigorous review of administrative actions. In tracing the partial relaxation of this control, and the controversies that still accompany it, we must note the sense in which it is realistic to speak of an increase of administrative finality.

In the case of the administrative determinations with which we are concerned, in the United States there has not been, and there could not be, a claim for the right of administrative bodies to decide a matter finally without any possibility to have it reconsidered in the courts. The courts would invalidate as unconstitutional any law that sought to confer this degree of final coercive power upon an administrative agency. Aside from national emergencies, the exceptions to this rule are unimportant. The realistic question, therefore, has two sides: first, on what aspects of the matters are the courts willing to concede that the judgment of the administrative body should be conclusive; and, second, do the courts prevailingly sustain the judgment of the administrative body on those phases which are subject to judicial reconsideration and possible reversal? If in practice the courts uphold the administrative body in most instances, the number of appeals is likely to lessen. Then administrative finality in a double meaning tends to exist as a fact. It is in this qualified sense of the word "finali-

ty " that we pass now to the rival claims of administrative methods and judicial methods in regulating economic matters.

III

The following historic arguments are advanced in support of the belief that, so far as possible, judical methods of determination should be used in the primary instance and that, in any event, there should be the widest possible scope for judicial reconsideration of any administrative action that is coercive in its effect.

(1) Judicial habits are inherently cautious. Caution is supremely desirable when a government deals coercively with people's persons or property. If a choice must be made, cautious action is more important than swift action.

(2) Detachment is desirable in a double sense of disinterestedness. It includes more than impartiality between litigants. The word " detachment " also means that the judicial officer is not connected with, or emotionally involved in, any particular governmental programme. He is concerned only with the just application of all the laws, both in suits between private individuals and also in controversies between individuals and the government. It is hardly necessary to add that this argument has special force in countries that do not have a separate system of administrative courts.

(3) It is argued that a degree of uniformity is desirable in the administration of all the laws that bear coercively upon the people. Such uniformity of treatment is increased when the laws are carried out largely through courts or when, at least, opportunity exists for full judicial review of administrative actions.

(4) Finally, it is argued that there is no adequate substitute for the personal responsibility of the trial judge who sees the witnesses and passes upon the admissibility of the evidence.

Against the foregoing arguments, the following points can be made in support of the system of administrative determinations, including a reduced scope for judicial review.

(1) Promptness, it is said, may be essential if there is to be true justice. To the extent that administrative agencies can act more quickly than courts, justice may be advanced by this ability.

(2) So, too, justice may be increased by making it inexpensive. Therefore, so far as administrative procedures are likely to be less costly than judicial proceedings and appeals, they are more just in dealing with persons and concerns of unequal wealth especially those who do

not have the money to pay for long and expensive review proceedings.

(3) Related to the foregoing is the argument that the original proceeding should be so regarded and so conducted that the decision then reached is final. Protracted appeals and re-argument, with fresh consideration of evidence which should have been brought in originally, is unfair to persons without ample financial means.

(4) Additional arguments can be advanced in favour of a considerable degree of initial finality when economic matters are being regulated. When the government intervenes, it acts (at least, it should act) on the basis of facts. If there are protracted appeals, the facts may change before the administrative order is allowed to go into effect. Of course, to argue thus that regulatory orders should be applied promptly and firmly, on the basis of the facts as they are, also implies that changes must be made when circumstances change.

(5) In addition, the argument for administrative finality (as the prevailing condition and normal expectation) involves still another factor. It is the factor of the morale of the administrative body. In the United States, it is said with much truth that the public utilities commissions in the states, which are set up to regulate utilities like railroads, electricity, and gas, tended often to become discouraged and over-timid in part because of the extent to which their determinations were challenged in the courts and often upset, so that the process had to start over again. In the face of this condition, the commissions were sometimes tempted to try so hard to anticipate and to avoid judicial objections that they took an unduly narrow view of their responsibility to act positively in behalf of the public interest. This point was well made by Jerome Frank, a distinguished judge in the United States courts who had also been an administrator. In his book, *If Men Were Angels*, he wrote: "The commission is far more afraid of censure by the upper courts than are the district judges on appeals from their decisions. The reversal of a trial judge is accepted as a routine matter; it never touches off an outcry for the abolition of the judicial system, nor for the repeal of the statute which the judge incorrectly construes. The reversal of an administrative order, however, often leads to charges of usurpation of power by the administrative agency, and to a demand for the destruction of that agency or of its statute."

(6) The fact that administrative bodies can be more specialized and expert than courts is a major argument in favour of administrative determinations. It is a reason why they should have a large degree

of finality in many complicated fields of economic regulation.

(7) Related to the foregoing argument is the fact that in these intricately empiric fields, many types of knowledge must often be blended in formulating an intelligent decision. It may require the combined skills of economists, lawyers, engineers, and members of other professions, as well as specialists within these professions, with the aid of general administrators who are broad in their sympathies and judgment. Administrative action, by its nature, is usually an "institutional product". This fact, of course, does not lessen the value of exceptional individuals in key positions. It is an argument that in general favours the administrative handling of the many-sided tasks of economic regulation, with a diminished amount of judicial review. Justice Frankfurter of the United States Supreme Court, in his opinion in the case of Driscoll *versus* Edison Light and Power Company, remarked: "The determination of utility rates—what may fairly be exacted from the public and what is adequate to enlist enterprise—does not present questions of an essentially legal nature in the sense that legal education and lawyers' learning afford peculiar competence for their adjustment. These are matters for the application of whatever knowledge economics and finance may bring to the practicalities of business enterprise. The only relevant function of law in dealing with this intersection of government and enterprise is to secure observance of those procedural safeguards in the exercise of legislative powers which are the historic foundations of due process."

I have set forth two opposing sets of arguments. All have some merit. The question is not to choose between the underlying values that are involved—for indeed the basic standards of justice and the canon of legality should guide all forms of organization and procedure. The problem is to adjust and to reconcile the elements of both systems.

IV

It is appropriate here to note the essential elements of administrative justice as understood in the common-law countries. Later we shall examine certain recent developments which have modified or supplemented these basic requirements. The three indispensable elements involve the concepts of notice, hearing, and evidence.

(1) Notice—that is, advance notice by the administrative agency to those who will be affected by a proposed determination, where action of a coercive nature has a specific incidence. The methods of giving notice may differ widely.

(2) Hearing—that is, an opportunity of some sort for the presentation of facts, arguments and rebuttal statements on the part of those who are affected by a proposed action. The hearing need not be oral. It may be conducted largely—and, in theory, it might be conducted wholly—through the interchange of briefs and other written material. What is essential is that the persons who will be directly affected by the proposed administrative determinations shall have a chance to learn what is proposed, and why, and from their side, to offer reasons why the contemplated action should not be taken, at least in the manner proposed.

(3) Evidence—that is, evidence appropriate and sufficient to support the judgment of the administrative agency in making the determination. A crucial feature of this requirement is the existence of an opportunity—at least a potential opportunity—of a court to pass upon the adequacy of the evidence as revealed in the records developed by administrative agency. In weighing the evidence, the standards of admissibility and sufficiency have varied, partly in response to changing legislative prescriptions.

In common-law countries the traditional rules of evidence were worked out largely in connection with trials conducted with amateur juries whose minds should not be confused or prejudiced by the admission of improper evidence. In modern legislation, a fluctuating effort has been made to free administrative bodies from strict compliance with certain technicalities in the traditional rules. The reason, of course, is that these rules were designed (as the late Justice Arthur T. Vanderbilt expressed it) "to protect from false reasoning a temporarily convened body of laymen", and if applied rigidly to administrative tribunals, "would have defeated the legislative purposes of despatch, elasticity, and simplicity of procedure".

A distinction has been drawn between administrative finality as to "questions of fact" and "questions of law". Historically, in countries that used juries, the judge ruled on questions of law while the jury decided the facts, except that the judge had reserve power to set aside a jury verdict which was deemed clearly to be unsupported by the evidence. This division of responsibility embodied a pattern which, with important modifications, was carried into the field of judicial review of administrative actions.

In connection with many types of administrative determinations, the laws have spoken of administrative finality as to the facts. Several examples may be drawn from regulatory legislation in the United

States. They show certain significant changes of wording. The Federal Trade Commission Act of 1914 (which was largely intended to get rid of unfair methods of competition lest they lead to monopoly) stated: "The findings of the Commission as to the facts, if supported by testimony, shall be conclusive." The Securities and Exchange Act of 1934 (concerned with the regulation of the sale of securities and the regulation of stock exchanges and public utility holding companies) said: "The findings of the Commission as to the facts, if supported by substantial evidence, shall be conclusive." The National Labour Relations Act of 1935 (which established a Board to prevent unfair practices in labour relations, especially against labour and to promote and facilitate voluntary collective bargaining) declared: "The findings of the Board as to the facts, if supported by evidence, shall be conclusive." However, as amended in 1947 by the "Taft-Hartley Law" passed under more conservative auspices, the provision was made to read as follows: "The findings of the Board with respect to questions of fact if supported by substantial evidence on the record considered as a whole shall be conclusive."

The provision last quoted, in point of its requirement that there must be a showing of "substantial evidence on the record considered as a whole", is in line with the position reached by the courts through years of controversy and realistic compromise in regard to the scope of judicial review of administrative determinations.

I do not think that the warmest defender of the administrative process should object to the word "substantial" (elastic though it is) coupled to the reference to "the record considered as a whole", to be distinguished from the idea that it would be enough to have evidence which, when viewed in isolation, would support the administrative action. On the other hand, the believers in administrative justice secured through suitably simple and flexible procedures, might properly doubt the wisdom of the language in the 1947 Labor Relations Act amendments which required evidence of probative force such as was fitting in the circuit courts. Language of this sort might invite an unsympathetic judiciary to scrutinize the evidence in the record of an administrative proceeding, not in terms of the standards that are suitable for administrative bodies, but in terms of compliance with certain traditional technicalities.

In the course of judicial reactions to the new administrative processes, the courts made claims from which they later withdrew in large part. Especially at stake in the Twenties was the question of *de novo*

judicial trial of questions of fact—that is, insisting upon calling witnesses and taking evidence freshly as distinguished from confining the review to the evidence presented in the record of proceedings before the administrative body. Certain decisions made it seem for a time that the courts might undermine the progress that had been made in confining judicial review to the administrative record and treating as final the administrative body's judgment about the facts if supported by evidence as revealed in that record, or, if crucial facts seemed to be missing, sending the case back to the administrative body for an amplification of the record.

In going contrary to this trend, the decisions to which I refer dealt with facts that the courts regarded as germane to questions of jurisdiction or constitutionality and therefore subject to *de novo* judicial inquiry. Justice Brandeis of the Supreme Court protested against the tendency in his dissent in a 1932 case wherein the Court upheld the action of the lower court in connection with its review of an administrative award under the national workmen's compensation plan for longshoremen and other harbour workers. "To permit a contest *de novo* in the district court", declared Justice Brandeis, "of an issue tried or triable before the deputy commissioner will, I fear, gravely hamper the effective administration of the act. The prestige of the deputy commissioners will necessarily be lessened by the opportunity of relitigating facts in the court. The number of controverted cases may be largely increased. Persistence in controversy will be encouraged. And, since the advantage of prolonged litigation lies with the party able to bear heavy expenses, the purpose of the Act will be in part defeated." Happily, these fears proved to be largely unjustified, in part because the courts did not persist in the tendency to reopen questions of fact for fresh trial. A desirable residue of the tendency, however, survives in the widened scope of judicial review in deportation proceedings, where the factual question of jurisdiction involves rights that are intensely personal and crucial. In passing, I should add that A.T. Markose in the treatise already cited, notes with favour that in India, in connection with jurisdictional facts, "the courts have the power to take additional evidence and to determine themselves whether such facts exist".

Throughout, a basic issue has been the scope which the courts would give to their retained right to decide questions of law as well as to pass on the sufficiency of the evidence. In 1920, the Supreme Court, in the case of Federal Trade Commission *versus* Gratz, over

vigorous minority dissent, declared: "The words 'unfair methods of competition' are not defined by the statute and their exact meaning is in dispute. It is for the courts, not the Commission, ultimately to determine as matters of law what they include." From this standpoint "questions of law" could be made all-embracing, since men cannot govern without using words, which depend upon their meanings. If one wishes, therefore, he can turn nearly everything into a question of law. From the other side, however, it can be said that the meaning of words depend in these regulatory matters upon the complicated, endlessly special facts of commercial life. On the whole, the United States Supreme Court in recent years has given much weight to this point of view.

V

I have said that the problem is to adjust the elements of what we may call the systems of "administrative justice" and "judicial justice". An eloquent plea for an atmosphere of collaboration between courts and administrative agencies was made by Chief Justice Stone of the United States Supreme Court, speaking for the Court in 1939 in the third of a series of cases ("the Morgan Cases") that played a prominent role in the discussion of judicial-administrative relationships and contributed to the passage of an Administrative Procedure Act in 1946. "Neither body", said the Chief Justice, referring in abstract terms to court and administrative agency, "should repeat in this day the mistake of the courts of law when equity was struggling for recognition as an ameliorating system of justice; neither can rightly be regarded by the other as an alien intruder, to be tolerated if must be, but never to be encouraged or aided by the other in the attainment of the common end."

This historical analogy is truly suggestive. The fact, however, that the regular courts took over the application of equity as a branch of the law mars Justice Stone's analogy from the standpoint in which we are interested: due respect for the essentially integral nature of the administrative process in fields of economic regulation (as distinguished from the fields of the criminal law and civil litigation); and the need for a prevailing degree of finality for administrative determinations. If this condition is not achieved, the autonomous role that is the virtue of an independent judiciary is a handicap to effective administration in the public interest.

CHAPTER VIII

THE PROBLEM OF INTERNAL SEPARATION OF FUNCTIONS

I HAVE BEEN discussing the limits of judicial review as an autonomous element that is external to administration. Now I turn to the problem of autonomy within the administrative process itself. The focus of our appraisal is the device of hearing examiners whose use in all national regulatory agencies is required by the United States Administrative Procedure Act of 1946. Without challenging the main objectives of the scheme, we face questions about the limits of certain procedural ideals which are drawn from methods in the trial courts, when applied to the composite nature of regulatory administration.

The problem of a practicable degree of segregation of functions within the administrative process is sharpened, on the one hand, by the fact that exponents of administrative justice, in defending it against the claims of judicial review, have extolled the internal capacity of modern administration to provide substitutes for such review. On the other hand, increasing stress is put upon the fact that regulatory action is an "institutional product" whose integrity as such must be respected and developed. These variant considerations underlie the issues with which we are concerned in this chapter, using the device of hearing examiners in the United States as a clue to a universal problem. As background for our example, it is appropriate to trace the story of several decades of agitation over the powers of administrative agencies and to note the developments that it helped to put in motion.

I

We may speak metaphorically of a counter-attack on the growing system of administrative determinations. It was waged from the Twenties through the following decades. It was waged in part by the courts themselves through decisions in which they sought to reestablish themselves on lost ground; it was waged in part by legislative bodies as allies of the courts. The emphasis of the emergent legislation, however, was upon procedures within the administrative agencies.

Before we pass to the legislative phase, note should be taken of the way in which the United States Supreme Court directed attention to procedures within the administrative agencies in the series of decisions called " the Morgan Cases ", decided during the Thirties. These cases were in fact one case for they dealt with different phases of a single situation. This situation arose in connection with the administration of the Packers and Stockyards Act of 1921. The law, among other things, gives the Secretary of Agriculture power to regulate the rates and practices at the stockyards at which cattle and other animals are assembled for slaughter and processing by the big meat-packing establishments. The law authorizes the Secretary to issue an order "whenever, after full hearing ... the Secretary is of the opinion that any rate ... will be unjust, unreasonable, or discriminatory ". In 1933 the Secretary issued an order regulating the rates charged by various stockyards in Kansas City. The order had been prepared by a bureau in the department; indeed, it had been started under the Secretary's predecessor. When the time came for the oral hearing, the Assistant Secretary presided. That practice was customary in the department in order to relieve the Secretary. It should be added that the department, in addition to its main responsibilities for agricultural development, was administering over forty regulatory statutes. When the order was issued, the Secretary signed it. He had, indeed, spent an evening looking through the findings and certain portions of the briefs and the transcript of the oral hearing. These portions were flagged for his special attention by the bureau personnel who had worked on the long investigations and the preparation of the order. But the district court, when the order was resisted and taken to the courts for review, refused to allow the lawyers for the stockyards company to put questions to the Secretary about his personal participation in preparing and issuing the order. In so refusing, it was following a customary line. When the case on appeal reached the Supreme Court in 1936, the question was whether the district court had erred in this respect. It was this situation (especially the fact that the Assistant Secretary had presided at the oral hearing) that led the Supreme Court to make a novel pronouncement on the requirements of a hearing. The court said: "... the requirement of a ' full hearing ' has obvious reference to the tradition of judicial proceedings in which evidence is received and weighed by the trier of the facts.... The ' hearing ' is the hearing of evidence and argument. If the one who determines the facts which

underlie the order has not considered evidence or argument, it is manifest that the hearing has not been given. That duty cannot be performed by one who has not considered evidence or argument. It is not an impersonal obligation. The one who decides must hear."

Accordingly the Supreme Court sent the case back to the district court for re-trial, with instructions that the Secretary should be asked about his participation in issuing the order. He answered over a hundred questions about his contact with the material. The district court concluded that the Secretary had in effect conducted a hearing. It upheld the order and the Supreme Court did not challenge this stand; the later "Morgan Cases" dealt with different objections to the procedure. The opinion of the district court alluded with a touch of sarcasm to the voluminous nature of regulatory actions of the type involved in these cases. It remarked that it had not read all the testimony nor did it think that the Supreme Court would do so. It added: "The Supreme Court has not said that it was the duty of the Secretary of Agriculture to hear and read all the evidence, and in addition thereto, to read the oral arguments and consider briefs. If the Supreme Court had said that it would have meant that the Packers and Stockyards Act... cannot be administered."

At the time, the Supreme Court's pronouncement about the characteristics of a hearing was sensational. The case remained a landmark even after the shock faded. It contributed to the movement that culminated in the passage of the Administrative Procedure Act of 1946. Especially did it support the provision for hearing examiners. Before we pass to their semi-autonomous role within the agencies, it is useful to trace the steps in the agitation for a law of some kind. It carried the counter-attack into the legislative arena.

II

The counter-attack, as I have called it, was waged in the name of the older tradition of the rule of law, symbolized in the passage I have quoted from A.V. Dicey. It was conducted in England as well as the United States. Abroad, the campaign was touched off in part by a book called *The New Despotism*, written by Lord Chief Justice Hewart and published in 1929. The agitation stirred up by this book led to an investigation by a study group known as the Lord Chancellor's Committee on Ministers' powers. Its report was generally reassuring about the existing situation. It did suggest the need for some safeguards.

In the United States, almost at the same time and for substantially the same reasons, a sharp attack on the system of administrative determinations was led by a special committee on administrative law of the American Bar Association. The attack was partly motivated by a constructive criticism of existing practices; in part it was a conservative reaction against the period of active reform and increased governmental functions that followed the great depression and Franklin D. Roosevelt's election as President in 1932. The advancing tempo of control may be seen by noting the dates of establishment of fifty-one regulatory units in the national government (not counting emergency agencies) which were studied in 1940. Of the total number, three had been created by the first Congress, eight more had been added by 1860, six were set up between that time and the end of the century, nine others between 1900 and 1918, nine more in the period to 1929, and seventeen in the decade that ended in 1940. Indirectly the criticism of administrative power of these latter years drew additional strength from the recoil of feeling in the United States against arbitrary government in the totalitarian regimes.

The agitation spearheaded through the Thirties by the Bar Association's special committee led, after a number of alternatives had been considered, to the passage by Congress in 1940 of a measure called the "Walter-Logan Bill" from the names of its sponsors in the two Houses. The President vetoed it. In his message he declared that "a large part of the legal profession has never reconciled itself to the existence of the administrative tribunal". He went on to say that "in addition to the lawyers who see the administrative tribunal encroaching upon their exclusive prerogative there are powerful interests which are opposed to reform that can only be made effective through the use of the administrative tribunal. Wherever a continuing series of controversies exist between a power and concentrated interest on one side and a diversified mass of individuals, each of whose separate interests may be small, on the other side, the only means of obtaining equality before the law has been to place the controversy in an administrative tribunal....Great interests, therefore, which desire to escape regulation rightly see that if they can strike at the heart of modern reforms by sterlizing the administrative tribunal which administers them, they will have effectively destroyed the reform itself."

In the meantime, as a concession to those who were agitating for restrictive legislation, that would apply blanket-like to all agencies,

the Attorney General in 1939 had created a temporary committee on administrative procedure. It reported in 1941. The majority of its members did not believe that there was an imperative need for general legislation. They pointed to the diversity among the agencies. They did stress the desirability of more public information about the structure, procedures and standards of the administrative bodies. They emphasized the fact that, so far as possible, the matters coming before these bodies should be disposed of informally in the early stages. In addition, the majority report observed that many agencies were already practising a partial segregation of functions and were using hearing officers as a feature of this segregation. The report suggested that the device should be improved by clarifying and strengthening the status of the hearing officers, and that for this purpose and others it would be helpful to establish a permanent office on administrative procedure for the government as a whole.

The minority members of the committee were more insistent upon the need for a rigorous code of administrative procedure. Attention was diverted from the matter during the Second World War. At its close the minority members in their private capacities helped to re-revive the agitation for a law.

The statute that emerged in 1946 was the Administrative Procedure Act. It was less drastic than the earlier proposals. In the following years a number of states have passed administrative procedure acts which resemble the national law. In general, the emphasis has been upon strengthening the safeguards within administration, rather than a marked increase of judicial review.

It is true that judicial review is supported by the language of the act as well as the spirit that it embodies. On the matter of evidence it states that "except as statutes otherwise provide, the proponent of a rule or order shall have the burden of proof". The evidence which is admitted must be "reliable, probative, and substantial". As to review, it declares that "every agency action made reviewable by statute and every final agency action for which there is no other adequate remedy in any court shall be subject to judicial review". The scope of the review is defined as follows: "So far as necessary to decision and where presented the reviewing court shall decide all relevant questions of law, interpret constitutional and statutory provisions, and determine the meaning and applicability of any agency action. It shall (*a*) compel agency action unlawfully withheld or unreasonably delayed; and (*b*) hold unlawful and set aside agency

action, findings, and conclusions found to be: (1) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law; (2) contrary to constitutional right, power, privilege, or immunity; (3) in excess of statutory jurisdiction, authority, or limitations, or short of statutory right; (4) without observance of procedure required by law; (5) unsupported by substantial evidence... reviewed on the record....; (6) unwarranted by the facts to the extent that the facts are triable *de novo* by the reviewing court. In making the foregoing determinations the court shall review the whole record or such portions thereof as may be cited by any party...."

The Supreme Court, in a revealing decision in 1951 (Universal Camera Company *versus* National Labour Relations Board), said that it found a " mood " in the recent legislation on administrative procedure in relation to the courts. It spoke of the rule that evidence must be weighed upon the basis of the administrative record considered as a whole. In this connection it remarked, with a touch of irony, that " the substance of this formula for judicial review found its way into the statute books when Congress with unquestioning—we might even say uncritical—unanimity enacted the Administrative Procedure Act. " The Court's irony deepened in the further comment that " the legislative history of that act hardly speaks with the clarity of purpose which Congress supposedly furnishes courts in order to enable them to enforce its true will". Nevertheless, the opinion went on to say that when the Administrative Procedure Act is considered in conjunction with the Labour Relations Act amendments of 1947, as they bore upon the case before the Court, "it is fair to say that in all this Congress expressed a mood. As legislation, that mood must be respected. We conclude, therefore, that the Administrative Procedure Act and the Taft-Hartley Act direct that courts must now assume more responsibility for the reasonableness and fairness of Labour Board decisions than some courts have shown in the past." Applying this view to the case before it, the Supreme Court instructed the lower federal court, in reviewing the evidence upon which the National Labour Relations Board had acted, to give more weight to the hearing examiner's report.

III

It is with the examiners that our present critique of autonomy is especially concerned. The Administrative Procedure Act seeks to give them a protected, semi-independent status. It states that

"subject to the civil service and other laws to the extent not inconsistent with this act, there shall be appointed by and for each agency as many qualified and competent examiners as may be necessary... who shall be assigned to cases in rotation so far as practicable and shall perform no duties inconsistent with their duties and responsibilities as examiners". The act seeks further to guarantee their independence by saying: "Examiners shall be removable by the agency in which they are employed only for good cause established and determined by the Civil Service Commission... after opportunity for hearing and on the record thereof." The law also provides that the examiners shall "receive compensation prescribed by the Commission independently of agency recommendations or ratings."

The law emphasizes the need for what it calls a "separation of functions" within each regulatory agency. On this point, it states: "The same officers who preside at the reception of evidence... shall make a recommended decision or initial decision". It goes on to say: "Save to the extent required for the disposition of ex-parte matters as authorized by law, no such officer shall consult any person or party on any fact in issue except upon notice and opportunity for all parties to participate; nor shall such officer be responsible to or subject to the supervision or direction of any officer, employee, or agent, engaged in the performance of investigative or prosecuting functions for any agency. No officer, employee, or agent engaged in the performance of investigative or prosecuting functions for any agency shall, in that or a factually related case, participate or advise in the decision, recommended decision, or agency review... except as witness or counsel in public proceedings."

At the present time, more than three hundred examiners are serving under the regulatory agencies in the national government. The question for the student of administration is whether the degree of internal "separation of functions" (crucially embodied in the position of the examiner) is inconsistent with the "institutional" nature of the regulatory process.

The meaning of this term is shown in the following quotation from an article on "Institutional Administrative Decisions" by a leading authority on administrative law, Kenneth Kulp Davis, in the *Columbia Law Review* in 1948. He wrote: "An institutional decision of an administrative agency is a decision made by an organization and not by an individual or solely by agency heads. A trial judge's decision is personal; the judge hears evidence and decides the case. In the

administrative process, evidence may be taken before an examiner, the examiner and other subordinates may sift the evidence, various kinds of specialists of the agency's staff may contribute to the writing of proposed or final reports, and the agency heads may in fact lean so heavily on the work of the staff as to know little or nothing about the problems involved in many of the cases decided in the agency's name. The strength springs from the superiority of group work, from internal checks and balances, from cooperation among specialists in various disciplines, from the assignment of relatively menial tasks to low-paid personnel so as to utilize most economically the energies of high-paid personnel. The weakness of the institutional decision is its anonymity, its dissipated responsibility, its partial or complete rejection of the idea that the one who purports to decide must consider the record."

Against the background of balanced advantages and disadvantages, we may renew the question: does the attempt to re-centre a personal responsibility in a detached examiner who presides at the hearings and develops a recommended decision threaten to undermine the strength that belongs to an institutional process without removing its weaknesses? The question, put more fairly and realistically, does not imply an attack on the system of examiners in itself. Rather, it points to the need for caution about isolating the examiner unduly. In this form, it is partly a question of arrangements and practices under the existing law. It is also a question of the undesirability of new legislation which might increase the separation of the examiners.

The problem of the proper use of examiners under the existing law has been discussed in a thoughtful monograph by a student of administration, Lloyd D. Musolf, published in 1953 under the title, *Federal Examiners and the Conflict of Law and Administration.* He declared: "If regulation by administrative agencies is to remain viable, then a strong argument exists for discouraging departures from certain characteristics of examiner behaviour. If through excessive emphasis upon their similarity to trial courts, examiners are encouraged to disregard the importance of agency policy-making and 'go it on their own', their usefulness to agencies is deeply impaired. In order to assure integration of policy—and perhaps to protect its own prestige—an agency must consistently overrule any examiner who persists in ignoring agency policies in writing his decisions. If through strict application of the separation-of-functions

requirement examiners are prevented from consulting technical experts in the agency, interest groups being regulated probably are not benefited. They learn only the examiner's views but not those of the agency. Consequently they may meet the agency's views too late to counter them."

Professor Musolf further emphasized the need for team-work by saying that the examiner "must have a thorough working knowledge of agency subject matter, policy and precedent. This can only be accomplished by knowledgeable use of facilities for consultation and research within the agency. By so equipping himself he contributes to the specialized competence demanded of regulatory agencies. This competence is all of one piece. It consists of the acumen of an experienced field investigator, the patient questioning of uncooperative or unschooled witnesses by a trial attorney, the calm demeanour and methodical reporting of a trial examiner, the skilled advising of technical consultants, the wise counselling of a chief examiner, and the shrewd summarizing of advisers to the agency heads."

The author did not belittle the contribution of the court tradition to the examiners' performance. But he added: "To the extent that this tradition has assumed that the examiners' integration with agency expertise is unessential it has misinterpreted the administrative task and done regulatory administration a disservice."

From these standpoints, so far as new legislation is concerned, I think we may question the desirability of the recommendation made in 1955 by the Commission on Organisation of the Executive Branch of the Government (the "Hoover Commission") in its report on "Legal Services and Procedure", where it recommended that "hearing examiners should be replaced by hearing commissioners who are completely independent of the agencies whose cases they hear, who are appointed by an authority other than such agencies and, to the extent possible, assigned to one agency on a continuing basis". The recommendation contemplated that the hearing commissioners would be under the administrative control of a proposed "administrative court of the United States", which would be organized in sections for taxation, trade and labour matters. I shall not venture on a discussion of this last proposal. It renews an agitation that has gone through a number of variations during the last three decades. In my view, the risk is that such judicialized bodies would be likely to absorb much of the vitality of the administrative agencies.

The limitations that the nature of much present-day regulation

puts on the usefulness of examiners, at the best, were indicated by a spokesman for the Securities and Exchange Commission when the Administrative Procedure Act was being debated. He remarked: "We have found the process of preliminary consideration by an examiner, the making of advisory findings by the examiner, and commission consideration upon briefs and arguments on exceptions to the examiner's report, a fair and efficient procedure only when the determination which we are required to make is one with respect to which the issues of fact are relatively substantial and the range for policy determinations or financial judgment is narrow....On the other hand, our experience with the Holding Company Act has indicated that trial examiners, for the very reason that we have been at pains to isolate them from participation in the broader phases of the administration of our statutes, have relatively little to contribute to the resolution of the complex questions of financial judgment and policy which arise under the Holding Company Act. Every case under the Holding Company Act represents a segment of a nation-wide problem which must be determined on the basis of a uniform Congressional policy. The examiner, whatever his personal qualifications may be, has no opportunity to see more than dismembered segments of the overall picture. Moreover, problems under that act seldom involve issues of fact which turn substantially on the creditability of witnesses. The basic data in the typical Holding Company Act record consist of earnings statements, balance sheets, and statistical data showing revenues, cost of assets, growth of consumption, population trends, and the like. The issues involve the interpretation of these data and the application of policy standards in the act."

The foregoing example is that of a single statute. Nevertheless it is emblematic of the regulatory tasks of the modern state. The increasing prevalence of such legislation shows the need for care in avoiding a dissipation of administrative integrity through the overuse of two autonomous relations: the external review of administrative action by courts, and the isolation of officers like hearing examiners within the administrative agencies.

CHAPTER IX

THE PROBLEM OF AUTONOMOUS REGULATORY BOARDS

THIS CHAPTER brings to a close our survey of certain administrative problems in the public regulation of private economic activities. In examining these matters from the standpoint of a critique of the uses and limits of delegation and of autonomy, we have been considering, first, judicial review as an autonomous factor in relation to administration, and, second, the segregation of processes (embodied notably in devices like hearing examiners) as an autonomous element within administrative agencies themselves. My comments have stressed the need to respect the integral nature of the administrative process. Now I turn to the question of the structure of the regulatory agencies from the standpoint of their relationsip to the executive process as a whole.

In this connection, I note a remark by A.T. Markose in his treatise on *Judicial Control of Administrative Action in India* (p. 104). He wrote: "It appears that India is going to be a country of much administrative law and many great administrative agencies like America. Articles 301 to 307 envisage an Interstate Commerce Authority which will be a mighty administrative agency in India. This prediction may appear a little surprising today but within another half century when the real industrialization of the country will have taken place the prediction would become true."

It would be unfair to put too much weight upon this single comment as an indication of the author's full thought; the remark I have quoted bore a somewhat casual gloss being in the form of a footnote. It would be even more unfair to assume that the remark is a clue to widespread speculation in India about the future of regulatory needs and methods. Certainly it does not necessarily assume a belief in the degree of independence within the executive branch which in the United States has been given to regulatory commissions. Nevertheless it appears that we are warranted in giving attention to the extensive experience in the United States with what are often called "the independent regulatory commissions". It is perhaps even more interesting to other countries because it is an inconclusive experience,

still marked by differences of opinion about the proper structural arrangements for the conduct of regulatory functions in the economic field.

I

In the United States the "commission" device for economic regulatory purposes appeared at the state level during the nineteenth century, in the form of boards for the regulation of railroads and other utilities, before it was introduced in the central government by the establishment of the Interstate Commerce Commission in 1887. It should be added that at the outset this Commission was placed in the Interior Department. The connection was merely nominal, however, and the Secretary asked to be relieved of the routine duty of serving as the channel for the transmission of the Commission's annual report. Congress complied and severed even this perfunctory connection of the Commission with the executive departments.

Since about 1890 Congress has followed the pattern in connection with many of the important regulatory laws that it has passed. There were indeed many exceptions. Thus the control of the purity of food and drugs and of insecticides and seeds, the establishment of standards for certain agricultural products, the carrying out of the Packers and Stockyards Act, and the vast responsibilities of the agricultural price-support programme were entrusted to bureaus in the regular ministries. Meanwhile, however, the commissions multiplied.

The strength of the tendency was shown in the Atomic Energy Act of 1946. Here, to be sure, the responsibilities for research, development, and production (directly or by contract), as well as for control, were unique; they involved more than regulation in an ordinary sense. Nevertheless, it was significant of Congressional attitudes that (having made the important choice to put the matter under civilian rather than military direction) the desirability of entrusting it to a semi-independent board was taken almost for granted. The law provides for an Atomic Energy Commission of three members. In this instance, crucial decisions are reserved for the President and on some points for Congress also, in connection with questions like the release of materials or the sharing of information about secret processes. Although the Atomic Energy Commission is not usually classed among the great regulatory boards that stand outside the departments, its status is emblematic of a trend that continued even in the face of many doubts about the administrative

soundness of the commission device in the form in which it had developed in the United States at both the central and state levels.

In the national government of the United States the chief regulatory commissions include the following: (1) Interstate Commerce Commission (regulating railroad, truck, and bus carriers, waterway carriers, and inter-state pipe lines); (2) Civil Aeronautics Board (regulating air carriers, its control being supplemented by a bureau in the Commerce Department which is concerned with aeronautical facilities and the enforcement of standards for aircraft and pilots); (3) Federal Power Commission (regulating the inter-state transmission of electricity and gas in wholesale quantities and also licensing hydro-electric undertakings); (4) Federal Communications Commission (regulating telephone, telegraph, and wireless communications, including the licensing of broadcasting and television stations); (5) Federal Trade Commission (with power to issue "cease and desist" orders against monopolistic and unfair trade practices, including action against false and misleading advertising); (6) National Labour Relations Board (regulating the bargaining practices of employers and of labour unions in order to promote and safeguard the voluntary system of collective bargaining, including often the supervision of elections in the plants to determine which union is the appropriate bargaining agent for the employees); (7) Securities and Exchange Commission (regulating the security exchanges, the issuance of securities from the standpoint of the honesty of the statements made and other considerations, and also regulating utility holding companies, including the duty to see that these companies are reorganized in a rationally economic manner in point of the areas and activities that they cover); (8) the Board of Governors of the Federal Reserve System of banks—popularly called the Federal Reserve Board—which is not directly regulatory but which can influence the movements of deflation or inflation in the country's economy through its power to engage in "open market operations" and to control the re-discount rate by instructions to the twelve regional Reserve banks, and thus to reach the banks which are members of the system, including most of the commercial banks in the country; and (9) the Tariff Commission, which does not have regulatory power in its own right but which plays a semi-authoritative role since the President cannot act without its advice in adjusting tariff rates under the "flexible tariff" plan and the Trade Agreements Act.

It will be observed that several of the commissions, notably the

Federal Trade Commission and the National Labour Relations Board, are concerned with the policing of relationships that are widely found in commercial and industrial fields of activity. The other commissions are aligned with segments of the economy. This setting invites them to play a vaguely developmental role, which is somewhat at variance with the regulatory purposes that led to their establishment. It was different in important respects from the more comprehensive motive that in India underlay the Industries (Development and Regulation) Act of 1951.

In the United States the structural pattern of the commissions has varied in some details. The members are appointed for overlapping terms by the President with the consent of the Senate. The number of members ranges from five to eleven. The length of their terms varies from five to seven years, except that it is fourteen in the case of the Federal Reserve Board. In nearly every case, the members cannot all belong to the same political party. The laws are characteristically silent about their qualifications, aside from declaring that they shall have no financial interest in the economic sector with which they deal. In the case of the Federal Reserve Board the law does say that no more than one member may be appointed from the same Reserve district; it also states that in nominating them the President "shall give due regard to fair representation of financial, industrial, agricultural, and commercial interests, and geographical divisions of the country".

In the case of five of the bodies, the law provides that the President may remove a member only for cause, meaning that there must be some showing of neglect of duty, inefficiency, or misbehaviour in office. The Supreme Court has upheld the right of Congress to restrict the President's power of removal in the case of the regulatory commissions. The main precedent in this connection was established by the Court when President Franklin D. Roosevelt sought to remove Mr Humphrey as a member of the Federal Trade Commission. The President took this step after vainly asking for Mr Humphrey's resignation in a letter which said: "You will, I know, realize that I do not feel that your mind and my mind can go along together on either the policies or the administration of the Federal Trade Commission and frankly I think it is best for the people of the country that I should have a full confidence." Mr Humphrey took the matter into the courts and in 1935, in Humphrey's Executor *versus* U.S., the Supreme Court ruled against the President, saying: "The

language of the act, the legislative report, and the general purposes of the legislation, as reflected in the debates, all combine to demonstrate the congressional intent to create a body of experts who shall gain experience by length of service—a body which shall be independent of executive authority except in its selection, and free to exercise its judgment without the leave or hindrance of any other official or any department of the government."

The commissions are aided by staffs of varying size. In 1958 the total numbers of employees, in descending order, were: Interstate Commerce Commission, 2,285; Federal Communications Commission, 1,204; National Labor Relations Board, 1,124; Securities and Exchange Commission, 838; Federal Trade Commission, 727; Federal Power Commission, 708; Civil Aeronautics Board, 627; Federal Reserve Board, 578; and Tariff Commission, 218.

The relatively large number of hearing examiners employed in the commissions is a sign of the extent to which the government's regulatory work is vested in this form of agency. In 1954, in a total of 278 hearing examiners, 213 were serving under the commissions. The Interstate Commerce Commission led with 106 examiners; the National Labor Relations Board followed with 47; the Civil Aeronautics Board with 21; the Federal Communications Commission with 17; the Federal Power Commission with 11; the Federal Trade Commission with 8; and the Securities and Exchange Commission with 3. These numbers contrast with 65 examiners employed at that time in all other agencies and departments, among which the largest contingent were 20 examiners attached to the Appeals Council in the Department of Health, Education and Welfare.

II

The arguments in favour of conducting the economic controls through the device of the independent commission may now be set forth against the foregoing background of history and structure. First I shall note the main arguments and then take account of certain additional contentions, expressed or implied.

Economic Controls through Independent Commissions

The main arguments in favour of the use of the commission device, instead of vesting the regulatory powers in the regular ministries, may be summarized as follows:

1. The virtue of the independent commission lies in the interaction

of three structural features:

(*a*) The commissions are specialized and relatively small. Although they have numerous employees (as revealed in the figures cited above), they are small compared with the ministries. They concentrate their attention upon some phase or process of the economy. As self-contained bodies they can act without waiting for the heads of ministries who have duties of many types to find time to consider the decision under conditions that at best may be hurried and perfunctory.

(*b*) The commissions are collegial. That is, the head is not a single officer; it is a group of men who must discuss and agree on decisions, at least by majority vote.

(*c*) The commissions are relatively independent in their relations to the chief executive. Thus they are relatively free from such pressures upon their current actions as might be exerted through him for party or other political reasons.

2. The foregoing three structural features are appropriate in projecting what is, in reality, a continuing legislative process. In the regulatory fields covered by the commissions, the legislative body itself cannot know, let alone predict, the detailed situations that are faced in dealing with the complicated, changing, technological factors that are involved in modern economies. The legislative body is competent to decide that a phase of the economy, or a type of economic relationships, is sufficiently affected with the public interest to require regulation. It can lay down broad standards. But it must entrust some administrative agency with the task of giving fuller meaning as well as specific application to these standards. The discretionary projection of the legislative intent is necessarily a process of sub-legislation. This delicate responsibility is carried out most safely and wisely by a group of men who serve under conditions of continuity and detachment from executive influence.

3. The same three structural features are also appropriate because they safeguard the process of adjudication which inevitably accompanies the detailed application of a broadly-phrased regulatory law.

Sub-Legislative Role of Commissions

In addition to the foregoing main arguments, the vogue of the commission device in the United States has derived support, at least

indirectly and impliedly, from the following factors.

1. The defenders of the commissions have usually stressed their sub-legislative role. They have linked it to the idea that the commissions are peculiarly agents of Congress. This argument helps to gain Congressional support. Under the presidential form of government, it is strengthened by the legislative body's attitude towards the elected chief executive, whom the legislature does not appoint and whom it cannot dismiss except by the extreme and hardly usable method of impeachment.

2. Implicit also, but seldom clearly avowed, is the argument that the method of regulating economic matters by independent commissions—each separate from the others and acting through a case-by-case procedure—lessens the likelihood that the government will become involved in overall economic planning and the alleged risks of regimentation. Thus the method suits a society which wishes to rely on automatic self-regulation through competition as its main policy while taking care of certain acute points of strain in the economy.

III

Now it is fitting, in the same spirit of noncommital survey, to canvass the points of criticism.

1. It is said that the system of commissions creates a "headless fourth branch" in the United States government and violates the principle of a tripartite separation of powers. This complaint was voiced in the report in 1937 of the President's Committee on Administrative Management. It described the regulatory commissions in the following words: "They are in reality independent governments set up to deal with the railroad problem, the banking problem, or the radio problem. They constitute a headless fourth branch of the Government, a haphazard deposit of irresponsible agencies and uncoordinated powers. They do violence to the basic theory of the American Constitution that there should be three major branches of the government and only three. The Congress has found no effective way of supervising them, they cannot be controlled by the President, and they are answerable to the courts only in respect to the legality of their activities."

The President's Committee summarized its indictment by declaring that, "though the Commissions enjoy power without responsibility they also leave the President with responsibility without power".

It must be said that the essence of the Committee's criticism (despite its tactical effort to invoke a constitutional tradition) rested upon the questions of responsibility and coordination, not the violation of the tripartite "separation of powers" as a legal doctrine.

The Committee's report recommended that the work of the commissions should be assigned to appropriate ministries. Under their supervision the active phases—that is, planning, investigation, and the receipt of complaints and the initiation of prosecutions—should be handled by single-headed bureaus, while the commissions would survive as autonomous adjudicatory boards within the departments for the handling of cases that involved administrative adjudication.

2. A second main ground of criticism has been the argument that the commission device is inherently unfair because it combines the duties of prosecution and decision. Pushed to its logical conclusion this argument becomes an attack on the methods of administrative justice generally. As applied to the commissions, a corollary of the criticism has usually been the theoretical complaint that the combination of prosecution and decision in the same agency is likely to result in arbitrary and unduly harsh action.

We have seen that attempts are made to offset this criticism by various forms of segregation within the administrative process. We have speculated about the limits of this tendency from the standpoint of respecting the integral nature of administration. From a different point of view, the Attorney-General's Committee on Administrative Procedure, reporting in 1941, criticized the degree of segregation which would attend the plan of the Committee on Administrative Management for bringing the regulatory work under departmental auspices while retaining the commissions for the adjudicative phase of the process. The Attorney General's Committee argued that, so far as possible, all matters should be disposed of at the outset by informal methods, instead of ripening them into formal complaints that lead to long, costly proceedings. The Committee believed that an undue separation of responsibility for prosecution and decision in regulatory work might discourage the informal handling of complaints. In developing the point, the Committee's report said: "A separation of functions would seriously militate against what this Committee has already noted as being numerically and otherwise the lifeblood of the administrative process—negotiations and informal settlements. Clearly, amicable disposition of cases is far less likely

where negotiations are with officials devoted solely to prosecution and where the prosecuting officials cannot turn to the deciding branch to discover the law and the applicable procedures." Thus the argument became in effect a defence of the commission device, because it was feared that substitutes for it would be attended by a further degree of internal separation of functions than was involved in the use of hearing examiners.

3. Paradoxically, and with more reality, a third main critique of the commissions has been the charge that they have been unduly lax. This phase of the analysis has three aspects.

(*a*) The commissions, it is said, being relatively free from executive supervision, are liable to drift into a condition of dependence upon the interests with which they deal. It is true, of course, that economic regulation is not intended to be punitive; it is preventive rather than promotional but it is also supposed to contribute to the wholesome development of the industry in question. However, this relationship can easily degenerate into a narrowly protective attitude toward the industry, in which the commission becomes a spokesman for the status quo. Such a quiescent stand may be false to the true welfare of the industry itself. James M. Landis, in the spirited defence of the commission device which he offered in a 1938 book somewhat over-broadly entitled *The Administrative Process*, soundly observed that "the ultimate test of the administrative body is the policy that it formulates ; not the fairness as between the parties in the disposition of a controversy on a record of their own making". From the standpoint of the criticism of the commissions, it is fair to add that so far as their work is marked by short-run deference to the interests which they regulate, the attitude may be wholly honourable in the sense that no personal favouritism is involved. Unfortunately it is an attitude that opens the way for favouritism.

(*b*) In practice, the commissions are not responsible to the legislative body in any orderly way. They receive annual appropriations but this fact seldom provides an occasion for considering the substance of their work. Indeed, it would be inappropriate for the legislative body, its committees or its members, to concern themselves too closely with the detailed operations of regulatory agencies which make determinations in specific situations. The development of a code of legislative self-restraint in this regard

has presented a difficult problem in the evolution of legislative ethics. Unfortunately, the tradition that the regulatory commissions are peculiarly agents of the legislative body has been an invitation to various forms of interference. In a recent deplorable instance, it showed itself in the Senate's refusal to confirm the reappointment of an able and courageous member of the Federal Power Commission. The risks may make the commissioners timid.

(*c*) A further reason for timidity, of course, may be a commission's fear of being reversed by the courts. We have noted that a judicial reversal may have a more damaging effect upon a commission's public standing and its morale than is the result when the decision of a lower court is overturned on appeal. However, this difficulty is a general aspect of judicial review of administrative action; it is not peculiar to independent commissions as a distinctive form of structure. It must be conceded that the supporters of the commission device often say that the liberation of the administrative process from over-frequent judicial review has been helped because the courts were conscious of elements of safety in the system of independent collegial agencies. But this attitude has never been clearly avowed by the courts, nor are the assumptions in this claim subject to proof.

4. The commissions have been inept at planning. Their failure in this regard has been one of the most serious defects with which they have been charged.

The fault results in part from the case-by-case method of regulation. This procedure tends to induce a passive attitude in which the commissions wait for complaints to be brought to them. In these circumstances, the public interest—and with it, the long-run progress of the industry that is being regulated—are attended to interstitially and incidentally. On this point it is relevant to quote the report of the Commission on the Organisation of the Executive Branch of the Government (the "Hoover Commission") authorized by Congress in 1945. Its criticism is the more telling because (unlike the earlier administrative surveys) it did not attack the commission device as a whole. "The chief criticism that can be made of the regulatory commissions," it said, "is that they become too engrossed in case-by-case activities and thus fail to plan their roles and to promote the enterprises entrusted to their care. Typical of this is the attitude by which the Civil Aeronautics Board and the Interstate Commerce

Commission have approached the problem of building a route structure for the nation."

5. A related criticism of the commissions is that the board form of organization is inherently weak. This defect is an additional handicap in the face of the need for a vigorously positive and constructive handling of the tasks of economic regulation.

The study group appointed by the Hoover Commission commented on the failure in the past to develop the administrative role of the chairman as a factor that could offset the deficiencies of the board structure. It remarked: "Our staff reports indicate that the absence of such supervision today accounts in large measure for the delays and back-logs now too common. They also show clearly that the members will not voluntarily delegate to the chairman, or any other official for a substantial period, the necessary authority to perform these essential duties."

The study group recommended that the chairman's position should be strengthened. It also recommended that in every case (instead of a rotating chairmanship) he "should be designated from among the members by the President and should serve as chairman at his pleasure". A number of reorganization plans were put through in 1950 in line with these suggestions. In presenting them the President said they were designed to strengthen the internal administration of the commissions "by making the chairman, rather than the Commission or Board as a whole, responsible for day-to-day administration. Also, the function of designating the Chairman of these bodies is vested in the President in those instances where this function is not already a Presidential one." The President's message went on to quote from the "Hoover Commission's" report in support of the plans. It had summarized the reasons for the change as follows: "Purely executive duties—those that can be performed far better by a single administrative official—have been imposed upon these commissions with the result that these duties have sometimes been performed badly. The necessity for performing them has interfered with the performance of the strictly regulatory functions of the commissions. Administration by a plural executive is universally regarded as inefficient. This proved to be true in connection with these commissions."

The President's message explained that the reorganization plans vested in each chairman responsibility for appointment and supervision of personnel employed under the Commission, for distribution of

business among such personnel and among administrative units of the Commission, and for the use and expenditure of funds. But the message also pointed to the limitations on a chairman's new powers, saying: "In the conduct of all of these activities, the chairman will be bound by the general policies established by the commission and by its regulatory decisions, findings, and determinations. In addition, the right is specifically reserved to the commission to revise budget estimates and determine the distribution of funds among the major programmes and purposes of the agency. The appointment of the heads of major administrative units under the commission is subject to approval of the commission, and each commissioner retains responsibility for actions affecting personnel employed regularly and full time in his immediate office." It is evident how strong remains the collegial imprint, despite the enhancement of the chairman's administrative position and his potential availability as a linkage to the Presidency.

6. A further ground of criticism has been the turnover of commission members. The length of service has frequently been so short that it has partly refuted the claims of continuity and of expertness which have been made in favour of the commission device.

The study group cited above found, for example, that over a considerable period the average length of service had been three years for the Securities and Exchange Commission and the Civil Aeronautics Board and hardly longer in the case of the Federal Communications Commission. On the other hand, it is fair to note that the average for the Interstate Commerce Commission had been thirteen years.

The prevailing short tenure of the members may have unfortunate consequences. It is probably true that the most important qualities needed in a commissioner are mature intelligence, broad sympathies and moral integrity. So equipped, he can master the expertise of an industry. In practice the recruitment of commissioners has been haphazard. Under conditions of short tenure, with no career in government service in prospect, it is likely that a commissioner who has severed his prior business or other connections will have learned enough, and formed contacts enough, to accept employment in the regulated industry. This possibility involves troublesome problems of conflict of interest.

7. The appointment of the members of these powerful commissions (each acting under a broadly drawn statute) introduces an

uncertain factor into the politics of presidential elections in the United States. It is evident that the country's economic policies will be shaped in considerable degree by the men whom the President will choose to fill the future vacancies on the commissions. Because of the relative shortness of service, the President (even within four years and certainly within eight years if he is elected for a second term) will be able to shape the majority of each commission. Nevertheless, the issues of policy that are implicit in this situation can hardly be made express and clear in a political campaign.

It should be added, in fairness to the commissions as a device, that a main difficulty lies in the unresolved nature of much of the basic legislation itself from the standpoint of clear policy choices. On this aspect of the matter, I venture to quote words that I used in the *Encyclopaedia of the Social Sciences* (VII, 20) in 1931: "The abandonment of laissez-faire is indicated most forcefully in the multiplication of *ad hoc* regulatory boards. Far from representing sound legislation and perfected administration, they are significant as confessions of a need and as the crude beginnings of control. A society intent on exploitation and schooled to leave adjustments to initiative and competition has become uncomfortable and been forced to act without knowing what it wished to do. The first steps have taken the form of a congeries of unrelated statutes nearly devoid of policy, by which undigested problems have been devolved upon amorphous agencies that administer a kind of compulsory arbitration among conflicting interests." Looking back, it must be said that in the regulatory legislation of the Thirties and later, progress was made toward more precision in the delineation of policy. On the whole, however, my earlier statement is not wholly inapt as a description of the situation even today. Its fault lies in the fact that it does not sufficiently acknowledge the necessarily experimental character of economic legislation in free societies with a mixed economy.

8. The final criticism of the commissions is lack of coordination, due to their relative separation from the executive, their separation from each other, and their methods of work. This indeed is fundamental; it is cumulative of all that has been said before.

IV

The controversy regarding the independence of the regulatory

commissions is now an old one in the United States. The system is deeply rooted in American government. Congress has been unwilling to abandon it in any fundamental respect. When in 1939 it gave the President power for two years to take the initiative in reorganizing the executive structure (subject to Congressional disapproval of the reorganization plan) the regulatory Commissions were expressly excluded. Thus Congress flatly rejected the recommendation of the President's Committee on Administrative Management. In the later grants of reorganizing power, as in 1945 and 1949, the exemption of the commissions has been less complete. Nevertheless, aside from a shift to departmental auspices of maritime functions, the commissions have not been dislodged. The sole change, already noted, has been to strengthen the administrative role of the commission chairmen and to empower the President to designate them from among the members.

Meanwhile, investigations (such as the inquiry into the Federal Communications Commission conducted by the Committee on Government Operations of the House of Representatives) have revealed the risks of private influences upon commission members and the extent of the conflicting pressures to which they are subject.

Nevertheless, as to the main structural criticism on the ground of lack of overall coordination, a complacent view has been shown in certain official studies in recent years. Such a view was illustrated in the report of the task group of the "Hoover Commission" that dealt with the regulatory agencies. They said: "... it is found that a large part of the work of the commissions is not closely related to that of the rest of the Government and requires no active coordination to avoid conflicts."

At the same time, the charges of lack of planning and of the inability to develop a positive and energetic policy remain unrefuted. From the other side, the need is shown in the often-repeated suggestion that in the United States the central government should have a comprehensive and purposive department of transportation.

It is sometimes proposed that the jurisdiction of the commissions should be enlarged, by extension or merger, as a remedy for the lack of a coordinated treatment of related phases of regulation. Such a widening of jurisdiction (perhaps administered by panels of a main commission) might aid in the concerted treatment of certain situations. It would be subject to the risk that a body which was traditionally aligned to one type of utility might not be equally sympathetic to a

new and partly competing facility. In any case it would fall short of the kind of flexible, overall concert that is secured through the influence of the general executive; it would be likely to neglect positive planning; it would lack the galvanizing possibilities that lie in executive stimulus and leadership.

Robert E. Cushman, in his exhaustive historical and analytical treatise on *The Independent Regulatory Commissions* published in 1941, speculated about measures—short of the absorption of the commissions in appropriate ministries—by which the President's coordinating influence might be increased. He suggested that the President should be permitted, as a matter of right, to issue statements of general policy which would not be regarded as an improper interference in the work of the commissions; that the grounds for removal of commission members should be clarified; that the laws should enlarge the range of matters on which the President might disallow actions by the commissions; and that the President should have greater power to require reports from the commissions. In support of these suggestions, Professor Cushman remarked: "There are many points at which commission policies impinge upon the general policies of the President for which the President as head of the nation is responsible. Commission policies impinge also upon other commission policies. In these areas the President should be given directing authority; it is possible to establish suitable devices by which this control and responsibility may be implemented."

I have said enough to show both the strength of the support for the independent commissions and also the extent of the critique. As things stand, the commissions as an institution seem impregnable. It is significant that the reorganization studies of the "Hoover Commission" (acting in this matter through a legally oriented study group) was less drastic about the need for a change in the system as a whole than was the President's Committee on Administrative Management in 1937.

Meanwhile, however, attacks are heard from the standpoint of administration. An illustration was Marver H. Bernstein's 1955 monograph, *Regulating Business by Independent Commission.* Students of administration in the United States—both academic and also those who deal in the executive agencies with problems of organization and methods—are animated by an outlook which is strongly integrative, partly in reaction against a diffusion of responsibility in the past. They are suspicious of corporative tendencies in the relation

of public bodies to industries and other economic elements, fearing that the public interest may be lost in such a relationship. This dislike is reflected in their criticism of what they call "clientism" in the behaviour of the regulatory commissions. Finally, it is their mood to disapprove any arrangements that unduly undermine the integral character of an administrative system, which is envisaged as the necessary instrument in accomplishing the purposes of a politically responsible government.

V

A few comments may be added on India's more coordinated pattern. Even in this case, however, it is evident how strong are tendencies toward a partially separate treatment of industries or economic segments, not least when the emphasis is upon development. In certain fields, like railways, government ownership is a substitute for public regulation. In time, perhaps, the problem of price policy between and within public enterprises may become more insistent; it may even lead to the creation of separate regulatory tribunals. Moreover, in the private sectors some aspects of public interest, which seem relatively unimportant during the early stages of industrial development, may lead to refinements of regulation such as are faced in the United States in maintaining competition while protecting the social values that may be endangered by it.

In India, meanwhile, the allocation of foreign exchange in itself involves far-reaching controls. Moreover, licences are required for all but very small undertakings. The system is administered by the Ministry of Trade and Industries. The controls that are involved must take account of many factors, in the spirit of the declaration in the Industrial Policy Resolution adopted in amended form by the Parliament in 1956. It states that "industrial undertakings in the private sector have necessarily to fit into the framework of the social and economic policy of the state and will be subject to control and regulation in terms of the Industries (Development and Regulation) Act and other relevant legislation". The Ministry of Trade and Industries proceeds through a licensing committee that draws in other elements, including a representative of the Planning Commission. This significant linkage illustrates the fact that the concerting of economic controls in ministries, though useful, cannot fully meet the requirements of coordination which are wider in some respects than can be brought together in any ministry.

For purposes of development in mixed economies, governmental institutions cannot avoid being plural in character. In these domains, administration is in part a representative process and in various ways a process of advocacy as well as support. This condition is reflected in the relatively autonomous position of the All-India Khadi and Village Industries Commission, and in the deference paid to the understandably strong emotional involvement of its leaders. It is reflected in the existence of units for the encouragement of small industry. In less autonomous forms it is illustrated in the statutory boards for such commodities as coffee, tea, rubber, and silk. In a still different way the same impulse is shown in the formation of more than a score of Development Councils in various industries, pursuant to the Industries (Development and Regulation) Act of 1951. The Ministry of Trade and Industries has the power to issue directives with reference to most of the matters that have been mentioned. Indeed, the Ministry's potential influence is larger than it cares to exercise. At the same time, developmental decisions, as in licensing, involve machinery that, where necessary, can take account of factors as broad in range as the concerns of national planning. It is this desideratum that underlies the need for coordination in economic regulation generally.

Part III

PROBLEMS OF AUTONOMY IN THE CONDUCT OF PUBLIC ENTERPRISES

CHAPTER X

PURPOSE AND FORM

In these concluding chapters our critique of the uses and limits of autonomy leads to the much-discussed question of public enterprise. We approach the matter from the administrative standpoint. Nevertheless, even a cursory treatment cannot avoid raising economic issues that have political and ethical implications. They involve the goals and strategies of national development.

We are concerned with governmental activities which supply goods and services on a voluntary basis for a fee or price. We face the question of how a government can organize itself to be an efficient and socially constructive entrepreneur, consistently with its political role. Our emphasis is administrative. As such, it does not directly involve the question why there should be a public sector or the question of its extent. Rather, the issue is how it may be best organized if it exists at all. Of course, the question "why" and the question "how" can hardly be separated. The objectives of public enterprise react upon its form; purpose is always a determinant of structure and procedures. It will be noted that the objectives of public enterprise vary and so will the appropriate forms and procedures. From the other side, the general desirability and the practicable scope of public enterprise depend in part upon the possibility of devising forms and methods that fit the needs of entrepreneurial types of activity.

I

When a government becomes an enterpriser, it is likely to be involved in a combination of three troublesome elements.

1. Quantitatively, the personnel is relatively large, in comparison with the numbers required in regulatory activities. This fact has administrative consequences internally; it increases the tasks of management. Externally, it may have political effects, so far as those who work for government are a factor in politics.

2. Qualitatively, entrepreneurial activity involves technique in a double sense. (*a*) The production and distribution of goods and services call for knowledge and use of many techniques of applied

science. To be sure, the same need exists in many non-entrepreneurial functions, both in welfare services and in regulation. (*b*) More important as a source of difficulty in public enterprise are techniques of a more empirical nature. These have to do with the ways in which things are done in the various fields of production and distribution. Each is a world of its own with its own unwritten rules and habits. Each is involved in constantly shifting conditions of demand, supply, and prices. The situation may call for rapid, frequently rule-of-thumb and chancy judgments in reaching and keeping a market. To conceive of a larger market of potential users and to reach and serve them are likely to call for a high degree of imagination, energy, and empirical sense, apart from technical knowledge.

In meeting these needs and difficulties, the favourable condition for public enterprise calls for a combination of stability and flexibility. (1) Stability includes: (*a*) the opportunity for consistent growth in line with long-time plans; (*b*) the creation and maintenance of adequate reserves for depreciation and development; and (*c*) managerial continuity. (2) Flexibility, at the same time, is needed: (*a*) in employing personnel; (*b*) in purchasing supplies in a changing market; (*c*) in setting prices and selling goods or supplying services in similarly fluctuating situations; and (*d*) in possessing funds with which to meet contingencies.

II

Against this background of the need for a combination of stability and flexibility, we may now consider the obstacles.

(1) Stability may be endangered by the spasmodic nature of popular government. Ordinarily it is attended by shifts of party control. The possibility exists, at least, and with it there is uncertainty. In addition, stability may be interfered with by particularized pressures. These influences may affect the decisions about plant location and extensions. They may lead to individual favouritism in such matters as the placing of purchasing contracts and the employment of personnel.

(2) Ironically, the handicaps to flexibility result in part from the safeguards which, in the course of administrative reforms during the past century or more, have sought to ensure a stable public administration, insulated from politics. (*a*) Thus, as to personnel, considerable rigidity is likely to accompany the attempt to bulwark a career service. It does this through entrance requirements, through

restrictions on removal or at least a strong tradition of assured tenure, and through a formal classification of grades and specified rates of compensation. (*b*) On the financial side, also, day-to-day rigidities may result from the movements that have led to the tightening of budgetary methods and related procedures. Such may be the unintended result of the requirement, for example, that all receipts must be paid into the treasury, that money may leave the treasury only pursuant to annual appropriations made by the legislative body in the budget law, and that all expenditures are subject to an independent governmental audit under legislative auspices in order to enforce a rigid adherence to the provisions of the statute laws and appropriation acts. (*c*) As for the procurement of material even when purchasing is not centralized some rigidity is likely to accompany the requirement that supplies and equipment must be bought upon the basis of competitive sealed bids, geared to specifications which are set in advance.

(3) The political boundaries may be a further obstacle to flexibility. The areas of the normal political and administrative sub-divisions may be inappropriate for the operations of an economic undertaking. When it is conducted privately, it may be able to disregard these boundaries, although when we say this we beg many questions about the regulations and controls that may restrict the movement of private enterprise even within nations, let alone between them. Suffice it to add that public enterprise, when tied to a particular governmental unit, is more seriously embarrassed by the inappropriateness of many of the political boundaries.

(4) Finally, we must take account of the possible handicap that may lie in the partial legal immunity of governments from lawsuit when they are acting in a "sovereign" capacity. To be sure, the seriousness of this matter should not be exaggerated, even for those countries in whose law there remain strong traces of the idea that the sovereign may be sued if at all only in his own courts and with his consent. Wolfgang Friedman, in the concluding chapter of the book he edited in 1954, *The Public Corporation—A Comparative Symposium*, remarked: "Where the Continental countries struggle against the fetters of their theory of administrative law, the common law countries are still obstructed by the remnants of feudal theory which has provided the government—Crown or Republic—with certain immunities and privileges." The practical effect of such surviving immunities upon the conduct of public enterprise is not

entirely clear. On the whole they seem a disadvantage to the government when it enters the marketplace.

III

Since the requisite condition for successful public enterprise is a combination of stability and flexibility (including where necessary a crossing of normal political boundaries) it is logical that governments should attempt to overcome the foregoing obstacles by various types of autonomous organization. The alternatives include: (*a*) modifications of the departmental system; (*b*) statutory public corporations; (*c*) government-owned companies formed under private law; (*d*) government participation in companies of mixed ownership; and (*e*) operation through contract or lease.

Before we examine the respective merits of these alternatives and their variants, it is necessary to look critically at the case for entrepreneurial autonomy in general. Its limits must be appraised in the light of certain offsetting considerations. Their crux is the extent of the need for coordinating control.

(1) From the standpoint of investment capital for public enterprises, it is necessary to ask whether a fully autonomous enterprise could borrow advantageously without the support of the credit of a general unit of government. From the same standpoint, it is necessary to ask about the conditions under which an enterprise may retain part of its earnings for expansion, and may decide itself when and where it will invest these funds. These matters involve crucial questions in the comprehensive direction of national development, so far as it is shaped by the public sector. We must ask whether it is possible to devise procedures that will provide for a coordinated handling of major questions of new investment in the light of a broad view of public interest and of a symmetrical national development. We must ask whether this can be done in ways that avoid the distorting demands of localized pressures, on the one hand, and hampering control of the operational decisions, on the other hand.

In working out the practical answers to these questions, a major difficulty lies in the fact that the undeniable need for coordination may too easily furnish the basis for the kinds of intervention which interfere with flexible, energetic, and productive administration.

How far can the problem be met by the right kind of financial framework, fixed in advance in the basic legislation or regulations? How far must the answer be found in habits of self-restraint which

rest upon a mutual recognition of the operational integrity and flexibility of the enterprises, and of the need for a limited number of coordinating decisions on matters of the highest importance?

(2) The investment policy of public enterprises is not the only feature of their management that involves the larger public interest. Their pricing policy has profound social implications, both from the standpoint of the extent of their obligation to meet or exceed their costs and also from the standpoint of their treatment of different types of demand and different sorts of consumers. Here enter many issues of social justice. They involve the country's general ideals and strategies of equalization and subsidy. Much depends upon the degree of monopoly or of competition under which public enterprise operates.

(3) So, too, the employment policies, wage levels, fringe benefits of a welfare nature, and bargaining practices in labour relations of the public enterprises are fraugth with questions of overall social policy. The ideal of operating autonomy must make terms with this fact. In this connection it is relevant to note that the Industrial Policy Resolution of India as revised in 1956, in commenting on labour matters, declared: "There should be joint consultation and workers and technicians should, wherever possible, be associated progressively in management. Enterprises in the public sector have to set an example in this respect."

Such are the larger claims with which the need for enterpreneurial autonomy must be reconciled. In each instance, the balance between independence and control is affected by the objective that leads a government to become an enterpriser. The objectives are numerous; the motives are varied and seldom single. As a further background for our analysis of structural forms and relationships in any particular national setting it is useful to look around the world and to note the many different reasons that have prompted governments to enter the marketplace in countries with mixed economies.

IV

The diverse motives that may lead to public enterprise are illustrated in the following list, which is set down almost at random. It will be observed how many of these motives overlap and also how often they would be inconsistent with each other if pursued simultaneously. In different circumstances the dominant purpose may be:

(1) To make money as a substitute for excise or sales taxes. This

motive is dominant in the case of the so-called fiscal monopolies in many countries. They are likely to deal in universal necessities like salt or matches or in commodities like tobacco products and intoxicating liquors for which there is likely to be a demand regardless of price although the society does not wish to encourage their use from the social point of view.

(2) To safeguard the production and distribution of a socially dangerous but necessary commodity. In some countries, the handling of narcotic drugs is an example. The risk sometimes has been that the fiscal motive may predominate. Somewhat different examples are found in the production and handling of serums and antibiotics. An increasing number of examples are likely to appear in the fields of radioactive isotopes, and indeed widely in matters involving nuclear fusion and fission, and this quite apart from the concern of governments with the defence aspects of nuclear energy.

(3) To aid in national (or local) development by providing capital which otherwise would not be forthcoming, because (*a*) of the size of the undertaking; or (*b*) the temporary hazards and risk of loss; or (*c*) the belief that the undertaking, though socially desirable, will remain relatively unprofitable. In such settings, public enterprise—unfettered on the basis of support from taxation and accompanied by ploughing in the income of the enterprise—may in essence be a form of forced saving as a means of capital accumulation or the rationalization of agriculture.

(4) To use the credit of a general unit of government. Being supported by the taxing power, such a unit of government is likely (except in conditions of impending bankruptcy) to be able to borrow money at low rates of interest. As we have already noted, the same motive that leads governments to resort to public enterprise may lead them to preserve a close connection between the government and the enterprise. In the case of the New York State Turnpike Authority, which has built a four hundred mile toll-highway across the state from New York City to Buffalo, and which borrowed the money to build it by issuing bonds, the guarantee of its bonds by the state government enabled it to borrow at about one per cent less than it would pay on its bonds if they were supported only by its own earnings. On the other hand, a strategically situated autonomous public enterprise like the Port of New York Authority (created by interstate compact between New York State and New Jersey and now operating bridges, tunnels, airports, and truck and bus terminals) is able to

borrow for expansion very advantageously on the basis of a pledge of its own earnings. In this case, however, the Authority would hardly have gotten started without the financial support of the two state governments.

(5) To conserve facilities which have become unprofitable (in the commercial sense) but which are still socially useful. Railway lines and even whole networks are likely to get into this condition in the face of road and air competition.

(6) To facilitate the carrying on of multiple, interrelated functions, some of which earn money but some of which do not. For example, the purpose of the Tennessee Valley Authority, as stated in the act, is to increase the standard of living of the people in the valley. To achieve this objective it was authorized to build and operate dams and power stations down the whole length of the Tennessee River, combining the purposes of: (*a*) flood control, (*b*) the improvement of the river for navigation (neither of which objectives can be made a source of profit to the Authority), (*c*) the generation and sale of electricity, and (*d*) the incidental manufacture and distribution of fertilizers which the Authority (in cooperation with the agricultural colleges and other organizations in the area) has used as a leverage in encouraging soil-conserving farm practices which in turn, among other advantages, reduce the amount of erosion and thus lessen silting in the reservoirs. In India, the Damodar Valley Corporation was created by statute to perform somewhat similar multiple purposes, including "the protection of public health, and the agricultural, economic and general well-being of the Damodar Valley and its area of operations". Another example, taken from France, is the Compagnie National d'Amenagement de la Region du Bas-Rhone et du Languedoc.

(7) To restore and maintain a languishing facility as a demonstration of its practicability and profitability. Thus in the U.S.A. during World War I, the government built and operated barges on the Mississipi River as an emergency measure. Afterwards, it continued their operation through an Inland Waterways Corporation (in the War Department), saying that it hoped to demonstrate the practicability of restoring an important amount of freight traffic on the river. Eventually, the barges were sold to private companies and the government operation ceased.

(8) To cheapen or augment the supply of a service or facility which is peculiarly indispensable as an adjunct to industrial activity (as may

be the case with transportation or electrical power, where direct public operation is preferred to public regulation of privately owned utilities).

(9) To subsidize consumers in areas of service which do not seem to attract capital under ordinary commercial conditions. Thus in the United States since 1937, blocks of low-cost housing have been built and maintained by local housing authorities in hundreds of cities (available only to families below a certain income level), subsidized in various ways including cooperation by the central government, and sometimes by the state government also, in loaning money under favourable terms and bearing part of the cost of acquiring land and getting rid of obsolete houses. This activity is tending to merge in a larger and more varied programme of slum clearance and urban re-development which is in response to a problem that besets most cities throughout the world: decay and dilapidation at their centres, accompanied by the escape of taxable wealth to the surrounding areas.

(10) To maintain a service in behalf of a particular body of consumers. The arrangement may amount to a form of consumer cooperation, accomplished within the frame of public law and public ownership. Examples are the "trust ports" in Great Britain (beginning with the Port of London Authority, but also applied at Liverpool and other ports), in which the members of the managing boards are elected by the users of the port—that is, the shipping companies and the traders in the various commodities. A different sort of example is rural electrification cooperatives in the United States, of which mention has been made in another connection. They are formed voluntarily under laws passed in most of the states at the suggestion of the national government through its Rural Electrification Administration (now a bureau in the Department of Agriculture). It makes loans to these cooperative associations of farmers, at relatively favourable rates, to enable them to build local transmission lines and related facilities.

(11) To improve the position of labour and to enlist its morale, perhaps by permitting greater participation in management (at least consultatively) than may take place under private ownership. This objective, however, may be offset by the fact that in many societies labour's right to strike, which is a basis for pressure in collective bargaining, is likely to be freer in private than in public enterprise. In many countries, labour has found that "nationalization" does not in itself mean "socialization". This fact accounts in part for changing attitude towards nationalization in democratic socialist thinking in

many countries. It is now tending to stress the ideals of regularity and coordination in the behaviour of the economy, and greater social equality in the society as a whole, rather than the nationalization of particular sectors unless for special reasons. Despite what has just been said, however, it is appropriate to note the trace of syndicalism in the nationalized industries of France, shown in explicit provision for labour representatives on the directing boards. From another angle, it is important to note the widespread espousal of the theory of government as "model employer" and also to note the extent to which, in many countries, industrial housing and welfare services are provided as "fringe benefits" by public enterprises. In some cases this practice is carried to lengths that raise serious questions about the location of responsibility for the development of the country's welfare programmes generally.

(12) To conserve and coordinate interlocked facilities in a "saturated" situation where a duplication of facilities is likely to be increasingly troublesome. An example was the establishment of the London Passenger Transport Board in 1933 (when a Conservative government was in power), which combined and operated in concert the underground, bus, street car, and local railway passenger services for London and the surrounding territory. The Board has since been merged in a larger undertaking.

(13) To promote the progress and economic advantage of particular localities, in competition with other localities. The construction by New York State of the Erie Canal (connecting the Hudson River with the Great Lakes, opened in 1821 and still operated as the State Barge Canel) almost at once lifted New York City to its position of the leading port of the country. Similar local pressures were prominent in the so-called "era of internal improvements" in the United States during the first half of the nineteenth century. Sometimes the results helped the general national development; sometimes they had a distorting effect.

(14) To provide employment in areas of displaced labour. Such displacement may occur in agricultural sections when farm mechanization or other technological changes in the methods of production, if not offset, are likely to worsen the already existing amount of "disguised unemployment" which is characteristic of many agricultural regions.

(15) To make it easier to control the timing and volume of investment as a phase of a countercyclical fiscal policy. In some societies, this may be used as a collateral argument in favour of a large amount

of government ownership, on the ground that it is easier for a government which is attempting to pursue a stabilizing financial policy to accelerate or slow down the rate of investment in the public than in the private sector. However, countries which rely heavily on theories of fiscal policy in governmental relations to the economy are not likely to stress governmental ownership as an ideological goal.

(16) To conserve a wasting resource (as in the case of certain scarce minerals) or a resource like forests which is replenished only by a long and unprofitable waiting period.

(17) To bring foreign capital into a developing country under conditions which (it is believed) lessen the risks of foreign exploitation and tendencies that may keep the receiving country in a so-called "economic colonial status". Related to this argument for public enterprise may be the belief that it is easier in public enterprise to ensure an opportunity for the employment of nationals in the high managerial positions. To be sure, as is quite typical especially in developing countries, national legislation may require that a certain proportion of the personnel in private undertakings must be nationals. It can be contended, however, that the outlet for employment in top positions of engineers and other graduates of the higher educational institutions is likely to be greater in public enterprises than in private enterprises maintained as subsidiaries of foreign concerns. Also related to the argument is the belief that the shift from purchasing abroad to purchasing at home in the capital-receiving country may take place more rapidly if the imported capital is invested in companies under government control.

(18) To offer competition as a means of combating monopolistic tendencies, and thus to help in ensuring low prices and adequate services for consumers. In the electrical field in the United States (where privately owned utilities are dominant but not universal), this has sometimes been called the "yard-stick" theory of public enterprise. This theory, however, assumes that all the elements of cost will be comparable. If not, it is more appropriately called the "birch-rod" theory. The result may be constructive when it demonstrates the promotional effect of low rates, leading through increased use to lower unit costs. The difficult question of comparable costs, under conditions where success or failure depends upon sales at prices based on self-contained financing is indeed crucial in the role of public enterprise with reference to an overall theory of consumer choice as the determinant of economic behaviour.

(19) To buy and sell a commodity as an adjunct of a scheme of price-support. In such cases the activity may be a phase of an essentially regulatory purpose ; only incidentally is it a trading undertaking. This characterization seems to apply, for example, to the billion-dollar operations of the Commodity Credit Corporation, which is an arm of the United States Department of Agriculture and is headed by a board composed entirely of departmental officials. A somewhat similar role in price-support in behalf of farmers is played in Turkey by the public enterprise called Toprak.

(20) To conserve a country's international exchange. This motive has led many countries to establish manufacturing establishments at home in pursuance of a selective strategy aimed at relieving particular strains on their international monetary position.

(21) To produce goods or provide services primarily for use within the government (as in the armed forces), involving facilities which are also used to produce articles or services for sale. A considerable amount of minor public entrepreneurial activity throughout the world has developed in this incidental manner.

(22) To promote and safeguard an essentially cultural undertaking. Since in these chapters we are concerned with economic matters, it would be irrelevant here to stress the instances of public enterprise (national and local) in fields like the theatre, opera, and music, which indeed usually involve elements of subsidy. Likewise, it would be of questionable relevance to examine the motives that lead to public enterprise in the recreational fields, as in facilities at national parks. Passing mention should be made of the role of governments in broadcasting, either as a monopoly as in Great Britain, or on a split public-private basis as in certain Commonwealth countries, or in occasional city-owned or state-university-owned stations in the preponderantly private broadcasting system in the United States. It may be noted that, although the British Broadcasting Corporation is supported mainly by a tax on owners of receiving sets collected by the Post Office Department which operates the physical transmitting facilities, the B.B.C. as an enterprise draws revenues also from its publication programmes and related activities.

V

The foregoing motives, in varying combinations, have characterized public enterprise in many places throughout the world. Some of these motives are especially marked in the industrialized countries.

In the less developed countries, the emphasis has tended to fall on the desire: (*a*) to control the conditions under which capital is brought in for purposes of development; (*b*) to deal with other governments as sources of capital; and (*c*) generally to initiate entrepreneurial activity in situations where private persons are unable or unwilling to assume the risks and responsibilities of certain socially desirable phases of development, including the spread of new skills.

A. D. Gorwala, in his *Report on the Efficient Conduct of State Enterprise* prepared for the Planning Commission of India, soundly remarked that "the rationalization and socialization of existing industries is a very different matter from the establishing and running of new industries". The same point is forcefully made by A.H. Hanson in his bok on *Public Enterprise and Economic Development*, published in 1959 and outstanding, I think, in the recent literature on the subject. He observes that, even if our attention is confined to the non-communist countries, we must be careful to distinguish, on the one hand, the application of public enterprise in matured industrial societies like England and, on the other hand, its application in societies that are initially involved in developmental programmes both for agriculture and for industry. Nowadays, public enterprise is especially significant in the latter type of society. In India the scope of public enterprise in a mixed economy is outlined in the Industrial Policy Resolution, first promulgated in 1948 and revised to some extent in 1956. Asok Chanda, the distinguished Comptroller and Auditor General, in a book on *Indian Administration* published in 1958, remarked that "while not disturbing the complementary roles of the public and private sectors, the Industrial Policy Resolution of 1956 gave a new orientation and meaning to the role of the State in India's industrial development".

The amended resolution, having noted the original statement, declared that "after considering all aspects of the problem in consultation with the Planning Commission, the Government of India have decided to classify industries in three categories, having regard to the part which theState would play in each of them". The first category comprises those industries in which the further development would be the exclusive responsibility of the government. The second category covers the industries which (said the resolution) "will be progressively State-owned and in which the State will therefore generally take the initiative in establishing new undertakings but in which private enterprise will also be expected to supplement the effort of the State".

In the first category, for development through public enterprise, the following industrial fields were listed in the schedule that was attached to the Resolution: arms and ammunition and allied items of defence equipment; atomic energy; iron and steel; heavy castings and forgings of iron and steel; heavy plant and machinery required for iron and steel production, for mining, for machine tool manufacture, and for such other basic industries as may be specified by the government; heavy electrical plant including large hydraulic and steam turbines; coal and lignite; mineral oils; mining of iron ore, manganese ore, chrome oil, gypsum, sulphur, gold and diamonds; mining and processing of copper, lead, zinc, tin, molybdenum, wolfram, and certain other special minerals; aircraft; air transport; railway transport; shipbuilding; telephones and telephone cables, and telegraph and wireless apparatus (excluding receiving sets); and the generation and distribution of electricity.

In the second category were fields in which public initiative would not be exclusive, as follows: minerals generally; aluminium and other non-ferrous metals not in the first category; machine tools; ferro alloys and tool steels; basic and intermediate products required by chemical industries such as the manufacturing of drugs, dye-stuffs and plastics; antibiotics and other essential drugs; fertilizers; synthetic rubber; carbonization of coal; chemical pulp; road transport; and sea transport.

All other industries fall in the third category, to be developed solely by private enterprise. The Industrial Policy Resolution stated that in suitable cases the government may grant financial assistance to the private sector. " Such assistance, especially when the amount involved is substantial ", it added, " will preferably be in the form of participation in equity capital, though it may also be in part in the form of debenture capital ".

VI

It is obvious from the variety of motives and economic fields that the nature of the objective is likely to affect the type of administrative structure, especially from the standpoint of the degree of central direction and support that is appropriate for the type of undertaking in question.

Doubtless it is possible to speak more universally about certain common pre-requisites from the standpoint of internal management. Even here, however, a distinction exists between credit institutions,

on the one hand and operating institutions, on the other hand. Within the latter, moreover, important differences exist between such enterprises as railroads (with the problems of managing numerous personnel and renewable equipment but operating with regularity upon a fixed price schedule), or hydroelectric works (which require heavy initial outlay but relatively few operating personnel), in comparison with industrial establishments (such as a steel works or a chemical plant) which call for complicated managerial decisions and entrepreneurial judgment in producing for a fluctuating market.

It is against the background of this survey that I shall proceed in the next chapter to comment on the structural phases of autonomous organization.

CHAPTER XI

STRUCTURAL ALTERNATIVES

In comparing the forms of public enterprise we should have in mind that autonomy has two aspects: procedural and directive. I use the first of these terms to indicate a relaxation of certain normal requirements for the handling of money, material, and personnel. In contrast, directive autonomy means that the enterprise has considerable self-contained authority to make decisions on matters of policy.

I

The departmental conduct of enterprises accepts the first and rejects the second aspect of autonomy.

It is true that some critics of the autonomous concept go so far as to argue that, if ministries generally possessed the degree of internal flexibility that would be wholesome in all their work, they could conduct enterprises efficiently without any special modification of their methods. This outlook (half-expressed in much of Brian Chapman's recent writings) raises a fundamental issue. The proponents sometimes point to the "royal boards" in Sweden, which carry on most of the administration under the very general policy guidance of the ministers and their small headquarters staffs.

Dr Chapman voiced his doubts about autonomous organization in the preliminary working paper for the discussion of "devolution of powers to autonomous institutions" at the International Congress of Administrative Sciences, in 1959. "One conclusion", he remarked, "might well be that it is more important to reform central government administration so that it is capable of administering a twentieth century state than to experiment with new ad hoc methods, which have fundamental weaknesses in themselves." He wrote against the background of his fears about "the progressive feudalisation of society, where powerful closed corporations determine their own policies in their own interests". Presumably it was Sweden to which Dr Chapman was alluding when he noted "that at least one country has managed to adapt a nineteenth century administrative state to meet modern needs without having recourse to any of the major experiments in public administration used elsewhere".

In reply to the foregoing argument, so far as it is supported by the Swedish situation, two things must be said in addition to the fact that for the departmentally conducted enterprises, like the railways and hydroelectric undertakings, the fiscal routines are modified in important ways. They operate under revolving funds, not the general rules that require all receipts to be covered into the treasury and all expenditure to be paid from it on the basis of fairly detailed budgetary estimates and appropriations. First, I have been interested to note in Sweden that there is in progress another commission of inquiry into the forms of public enterprise; it is one of a series of investigations which, although inconclusive in the past, have at least shown some dissatisfaction with the conduct of the railroad and other undertakings under departmental auspices. The discontent is not with lack of sober efficiency in the honest conduct of the enterprises. Rather it arises from the vague feeling that perhaps another form of structure would provide a setting which would evoke more entrepreneurial imagination, innovation, and drive. Second, it should be said of Sweden that at least a score of undertakings are conducted as government-owned companies, not to mention some of mixed ownership. The undertakings organized as companies are mosty minor; however, they include an extensive iron-mining operation, originally of mixed ownership but now wholly government-owned.

Departmental administration, so far as it is suitable at all, works best for enterprises that are relatively regular in the routines of expenditure, pricing, and employment. In this connection, I recall the response of the highest career officer in the postal department of a small, well-run European country when I asked him whether it was inconvenient administratively to operate under the country's budgetary system. He smiled in almost a pitying way at my question. How, he asked, could the necessity of operating within a budget be inconvenient if the administrator is efficient? He went on to say that an administrator of a postal system who knows his job can estimate in advance what it will need to pay out and what it will take in. This story is indeed a wholesome reminder that good administration in any field involves the ability to look ahead in orderly fashion and to plan in the measurable terms of income and outgo. Nevertheless, the circumstances show the limits of the idea illustrated in the story; for, in addition to happening in a small country, it involved the kind of entrepreneurial service in which regularity is most strongly marked.

Going beyond the foregoing qualification, I venture to comment even more generally on the argument that, in the long run if not immediately, the normal procedures in all ministries should and can be made flexible enough, for the good of their work as a whole, to fit the system for the conduct of almost any kind of enterprise on a departmental basis with only minor adaptations. In appraising this outlook we must concede that some of the administrative reforms and advances of the last century in fields like finance and personnel did tend to become unduly restrictive. In many places their animating spirit has partaken too much of a policing control imposed upon departmental administration from the outside and projected within the departments in rigidly detailed procedures. Certainly it is desirable from every point of view that a more organic view should be taken of the controls as part of, and aids to, the administrative process which in every field requires a large measure of flexibility. This universal need is widely sensed; it is reflected in the literature of public administration everywhere; steps toward flexibility are in progress. Nevertheless, I do not think that the degree of flexibility which is desirable in departmental life generally goes for enough to meet the special necessities of public enterprise. Therefore, regardless of the progress that may be made in the wholesome loosening of departmental procedures, some additional adaptations are needed when government enters the market place. In this matter, with due regard for diversities in the nature of the enterprises, I am even more certain about future limitations than Dr. Parmanand Prasad in his 1957 monograph on *Some Economic Problems of Public Enterprise in India*, where he concludes that "in spite of the improvements so far made in the organisation of the usual departmental machinery, it does not seem of advantage, on balance to entrust it with the management of business enterprises".

The conduct of an enterprise within a department, under conditions that I have called procedural autonomy, is fitting when the activity is only incidentally entrepreneurial. An outstanding example has been the Commodity Credit Corporation in the United States Department of Agriculture. It is a statutory corporation but its directors and officers are officials in the departmental hierarchy. It is extensively engaged in the procurement, storage, and sale of certain agricultural commodities. It does these things, however, as an adjunct to the regulatory programme of price-support for farm products that the Department of Agriculture has conducted under law since the thirties. This difficult, ever-changing programme has been a main preoccupa-

tion of the Congress and a major responsibility of the department. The shifting provisions in the law and the large area of administrative discretion in its exercise have called for decisions at the highest level and the participation of many parts of the department. The objective has been to secure prices for farmers that would be fair in comparison with industrial price levels. In this sense the intent of the programme has been beneficial in its relation to agriculture, not coercive. In method, however, it has been a system of control with many phases, all of which must be conducted in concert. In these circumstances, the trading operations of the Commodity Credit Corporation, despite their business-like features, could hardly be conducted autonomously in any true directive sense.

The submergence of entrepreneurial activities in a larger regulatory purpose is not infrequent. It would be idle to say that it is an undesirable mixture for (granting the objectives of control) the combination of methods is often necessary. In such situations, full autonomy is inappropriate. The solution lies in devising procedures which allow the business to be done while the department remains in constant command of the policies and operations.

II

If there is need for more than the procedural autonomy (as I have called it) that can be accomplished by a modification of the normal departmental system, much can be said in favour of seeking directive autonomy through statutory corporations, in preference to forming government-owned companies under the general laws for the incorporation of corporate entities with limited liability. In favour of the statutory corporation is the fact that this approach entails an initial decision in each case, suited to the nature and the purpose of the undertaking. The decision involves the setting of a financial framework which, so far as possible, should be self-executing. It should state the basic formulae for the disposition of the income of the undertaking, including the policy for amortization of the investment, the reserves to be maintained, incentive payments (if any) to the personnel, and the obligation of the undertaking to contribute its net earnings to the general treasury or its right to retain them in whole or in part for self-investment, in the improvement and enlargement of the enterprise. A well-conceived initial decision, creating by statute the financial framework which I have outlined, provides a favourable setting for operating autonomy. It can anticipate many

choices that otherwise would require frequent ministerial intervention.

I hasten to add that the framework erected at the time of the initial investment decision cannot remove the need for subsequent investment decisions. The timing, the place, the amount, and the purpose of each capital investment involve questions of social policy; they cannot be left to an individual enterprise even when the additional investment is to be financed from its own earnings. They must be related in some orderly way to the overall strategies of public investment, while these in turn take account of interacting and complementary movements in the whole economy. I am speaking, of course, of significant amounts of new investment, going beyond the kinds of expenditure that are involved in the replacement of equipment, plant modernization, or even an expansion in the same general field of activity when it is a phase of the growth to be expected in a healthy enterprise.

It is sometimes suggested that, in a country like India, all of the national public enterprises should be entrusted to a single, strong, and resourceful board. This body could deploy the management through general managers in the individual undertakings. So complete a degree of concert seems impracticable, however, if only because of the difference between enterprises that are utilities in the conventional sense, on the one hand, and, on the other hand, those of a more industrial nature that work in competitive markets. Doubtless the undue multiplication of operating entities should be avoided. Always, before a new undertaking is launched, it is well to consider whether the purpose in view can be developed under existing auspices. The main emphasis, however, should be placed upon the existence within any government of a point of reference, more inclusive than the coordinating role of any ministry or department, for the orderly consideration of investment decisions. Potentially at least, India's apparatus for planning already provides such a point of reference.

III

I have been stressing the advantages of a statutory financial framework for each enterprise (or perhaps a group of enterprises) within which it can more freely exercise a large measure of directive autonomy, subject to the important qualification about the control of new investment which we have noted. The virtues in this selective approach seem to offset the complications that may be encountered if it is neces-

sary to change the laws. To assert that there is a net advantage, however, does not close the door against the formation of operating entities under the general incorporation laws. The fluency of this method is an argument for its use in many circumstances. The variety of these circumstances, and the danger of a dogmatic statement are shown by the number of such companies that exist under India's central government alone. A flexible guiding rule on this matter was suggested in India by the Estimates Committee in a report submitted to Parliament in April 1960. "The consensus of the opinion of the authorities", it remarked, "appears to be that as a rule state enterprises should be organized as statutory corporations, but undertakings relating to defence having a strategic or security bias and enterprises designed for economic control may be run as departmental undertakings." It went on to say that, as a working ideal, "the company form of organization may be resorted to only (1) when the government may have to take over an existing enterprise in an emergency; (2) where the state wishes to launch an enterprise in association with private capital; (3) where government wishes to start an enterprise with a view eventually to transfer it to private management".

From the standpoint of the foregoing statement, we may question the universal desirability of the prohibition enacted by the United Congress as a feature of the Government Corporation Control Act of 1945. It stated that no corporation should be formed under the central government except by statute. Previously, both during the two world wars and during the period of the "New Deal" programmes of domestic reform in the thirties, the executive agencies of the central government had formed many corporations under the incorporation statutes of various states, to which they resorted as a matter of convenience. This procedure fell into disfavour for a number of reasons which were not wholly consistent with each other. From the standpoint of the executive agencies it was observed that incorporation in itself worked no magic; little could be done unless money was available to the incorporating department under conditions that permitted its flexible use. On the other hand, it could be argued in theory that an element of irresponsibility would be introduced if a corporate body of the kind we are discussing was able to borrow or earn large sums of money which it could use or invest at its own discretion. In practice, the corporations in question were departmental adjuncts; characteristically, their directors were departmental officials.

Meanwhile, the dominant mood of the advocates of administrative progress was in favour of a comprehensive system of co-ordinative control under the chief executive. Even before the "New Deal" period closed, President Roosevelt by a 1940 order required the government-owned corporations to submit to the Bureau of the Budget the annual estimate of their need for administrative expenses (as distinguished from the outlays that would be involved in their operations). The Government Corporation Control Act (in addition to forbidding incorporation except by act of Congress) carried the integrative movement a step further. It required that "each wholly owned government corporation shall cause to be prepared annually a budget programme, which shall be submitted to the President through the Bureau of the Budget on or before September 15 of each year." It went on to say that: "The budget program shall be a businesslike budget, or plan of operations, with due allowance given to the need for flexibility, including provision for emergencies and contingencies, in order that the corporation may properly carry out its activities as authorised by law." Needless to say, the volume of operations and the sums that are paid out and received in handling a revolving fund cannot be estimated in advance in the detailed way in which administrative expenditures can be forecast although they, too, are likely to vary with the scale of business done by the corporation.

Along with the budgetary requirement, the 1945 law extended the auditing jurisdiction of the General Accounting Office, but softened it by the wording of the proviso which said: "The financial transactions of wholly owned government corporations shall be audited by the General Accounting Office in accordance with principles and procedures applicable to commercial corporate transactions." This language embodied a *modus vivendi* that had been reached in a long controversy about the applicability to public enterprises of the normal auditing methods of the General Accounting Office. It should be added that students of public administration in the United States have been critical of the General Accounting Office from the standpoint of its effect upon administration generally, apart from the special problems of entrepreneurial activities. The complaints have been allayed in part by the steps which the General Accounting Office has taken to decentralize its processes.

In passing it should be noted that in India the Companies Act as amended in 1956 provided that the state companies should be audited by professional auditors appointed by the Government on the

advice of the Comptroller and Auditor-General, who may conduct supplementary test audits at his discretion. The law also required that the Government should cause an annual report on the workings and affairs of each company to be prepared and laid before each house, along with the audit report and any comment that the Comptroller and Auditor-General might wish to make. In the Government's discretion, companies in which the public share was less than fifty-one per cent might be exempted from these requirements.

From the standpoint of budgeting, the Estimates Committee, in the report that has been cited, recommended that "the undertakings should prepare a performance and programme statement for the budget year together with the previous year's statement and it should be made available to Parliament at the time of the annual budget. Further, these bodies might also be encouraged to prepare businesslike budgets which would be of use to Parliament at the time of the Budget decision. In addition, the latest accounts and balance sheets as well as the annual reports should also be made available to Parliament at the same time."

The significance for other countries of the example of restrictions under the Government Corporation Control Act of the United States is lessened by the relative absence of the United States of national public undertakings of an industrial nature. This fact reduces the managerial problems of the market place with which the government would otherwise be presented more sharply. I am speaking of the contemporary situation, not of the past. For it should be remembered that during the first half of the nineteenth century, in the course of a developmental epoch that American historians often describe as the "era of internal improvements", the units of government at all levels were extensively involved as participants in undertakings which were of many types, although especially concerned with transportation. The ideological prejudice against public enterprise came later. Even so, the public sector in the United States today is considerable and is increasing. I have said enough in other pages to show its varied range. On the whole, however, it tends to run more in the direction of credit support than direct operating responsibilities. The extent of the support is indicated by the statement in the report of the Commission or Organisation of the Executive Branch of the Government in 1955 on the subject of "lending agencies." It said (speaking only of the central government): "Over the past 42 years, the number of agencies or instrumentalities engaged in lending, guaranteeing, or insuring have

expanded to 104 entities (including incorporated and un-incorporated bodies), employing about 40,000 persons. The extent of Government operations in these fields is indicated by the fact that the total loans, guarantees, and insurance and contingent liabilities amount to 244 billion dollars as of June 30, 1954. The Federal Government has an investment of about 16.9 billion dollars in these 104 agencies, and these agencies are authorized to call on the Treasury for about 14.1 billion dollars of additional funds." Among other recommendations, the report urged that the scope of the Government Corporation Control Act should be widened to include the Housing and Home Finance Agency, the Rural Electrification Administration, the Small Business Administration, and Veterans' Life Insurance. It also recommended " that the Congress revise the Government Corporation Control Act to provide for Federal charters having greater uniformity in standards, requirements, and practices".

As to the last recommendation, which points to greater uniformity, I have indicated its limits in expressing a preference for statutory corporations, each set in a financial framework and with a managerial structure suited to the task. Nevertheless, this principle does not close the door against general legislation if it is cautiously drawn. It should deal with certain features of overall control, not with the internal affairs of the enterprises. In this spirit we should understand the recommendation of the Estimates Committee of April 1960 when it reported that " the Committee are of the opinion that it would be desirable to have a law similar to that of general laws in the United States and Canada in India also to govern corporations and government companies".

IV

I have been drawn into the foregoing analysis incidentally to a discussion of the method of organizing public enterprises as legal entities under the general company law, as distinguished from both departmental forms and statutory corporations. A word should be added about the use of incorporation under general law in connection with mixed enterprises. Here this method of incorporation tends to suit the mixed nature of the ownership. It is wholly suitable when the government participates as a minority stockholder. It is not unfitting when it holds a majority share, especially if the government's interest in the enterprise is tentative, during a transitional and experimental stage which includes the possibility that the undertaking

will become wholly private. Moreover, in a quite opposite direction, the purchase of minority stockownership may provide a way for spreading public influence in many fields of enterprise; as such, the method has a place in present-day socialist thinking in many countries. On the whole I venture to say that where the infusion of a social purpose is the reason for participation, governmental ownership of a majority of the voting stock is desirable.

As to the desirability of private minority participation on a permanent basis in certain circumstances, it is enough to note three arguments. First, in developing countries that must import industrial equipment and skills in launching public enterprises, their wish to do so in ways that protect their debt position and their foreign exchange often makes it desirable that the private aid should enter and take its chances as risk capital. Second, the interest and support of the people at home may be enlisted by the sale of shares in public enterprises. Third, it is arguable that, in any case, the presence of private shareholders introduces a spur toward greater efficiency. The strength of these considerations must be admitted. Nevertheless, any conclusion from world experience on the last point must be stated cautiously, with an eye to the risks of distortion or dilution of the public purpose that is the prime reason for the government's presence as majority owner.

In this connection we may note a historical example which bears indirectly upon the question that has just been raised. It is the story of the mixed undertaking called the Rhenisch-Westfaelischen Elektrizitaetswerk (popularly known as RVE). It owed its start as great generating and distributing network to the interest of certain German industrialists in the Ruhr area in an ample electrical supply. They conceived the idea of extending a form of mixed ownership as a sort of consumers' union. The enterprise, from its original centre in Essen, became the largest single electrical supplier in Germany, with operations that extended from the North Sea to the Alps. Not only the big industrial concerns from approaches as varied as steel and coal-mining, but also many municipalities and other public authorities participated through stock ownership. By the twenties, the public bodies held the majority of the shares. It was indeed a dramatic illustration of the fluent possibilities of mixed enterprise as a way of bringing together many interests. At the same time, however, it seemed that the participants, including the public bodies, were disposed to look at the matter as owners of profit-yielding shares,

rather than as custodians of consumers' interest. In fairness, I must add that this attitude was not entirely a result of the mixed form; it was consistent in general with the German outlook regarding public electrical enterprises as a source of revenue.

When mixed enterprise exists under the general incorporation law, the formal direction is located in a board of some kind which represents the owners of the shares. It is necessary for some organ of the government—a ministry or otherwise—to appoint or to nominate and to give instructions to those who represent the government as owner. In vesting this authority, the primary criteria, I think, should be considerations of development policy, not revenue.

Where political boundaries must be overcome, as in the interstate conduct of a river valley development, the representation of different regional interests may give the undertaking some structural characteristics which resemble the conditions and forms of mixed enterprise. It is interesting to observe some similarities but especially important to note the differences as illustrated in the Damodar Valley Corporation and in the Nagarjunasagar Project, as the latter existed before the merger of Hyderabad in the single state of Andhra Pradesh. In such cases, the questions that arise in the composition of the boards (if any) for direction and management are basically those that attend the use of boards in public enterprises generally. It is timely to pass to that aspect of autonomous administration.

V

A discussion of alternative types of boards may appropriately begin by asking why it has usually been assumed to be necessary to inject a directing board of some kind in conducting public enterprises.

The virtues that are attributed to such boards as an aspect of autonomy may be summarized in the following terms:

1. The existence of a board seems to justify conferring a larger degree of autonomy, since the board is (*a*) a substitute for direct ministerial control, and (*b*) a means of insulating the enterprise from political influence. Thus the board supplements control by the "market" (the control exercised by consumers in giving or withholding their patronage); both are assumed to be substitutes for political control and the ordinary forms of administrative supervision.

2. The existence of a board enlists the increased wisdom that may come from discussion and a meeting of minds in making policy.

3. The existence of a board facilitates a combination of interests or a coordinating combination of official elements in the direction of the enterprise. The relevance of this argument, of course, depends upon the type of board from the standpoint of its composition, to which we shall come later.

Against the foregoing arguments, A.H. Hanson, in the book on *Public Enterprise and Economic Development* already cited, throws out a provocative question. He asks: ". . . is there any point, in view of the Minister's policy-forming responsibility, in having a board as well as a management team? Could not the whole pattern of organization and control be simplified and rationalised by eliminating it?" This is indeed a trenchant question. It should be noted that it does retain the idea of some board or council, but in the form of the general manager's working "cabinet" of his chief subordinates. Advocates of autonomy may answer Mr Hanson's question by saying that its implications are an unwarranted confession of defeat for the ideal of entrepreneurial autonomy. It assumes a greater degree of ministerial intervention than should exist or need exist. To eliminate the insulating device of a policy-shaping board would be to invite a fuller measure of intervention in the operations of the enterprise.

To be sure, it is possible to point to many examples in the world of a "corporation sole" as a form of management for public undertakings. Thus in the case of the former Inland Waterways Corporation in the United States, the Secretary of War by law embodied the functions of both a general assembly and a board of directors. Acting in these combined capacities, the Secretary named the general manager. To this arrangement was added a purely advisory committee of persons who mostly reflected the shipping and other affected interests. In Australia the 1949 legislation that created the Snowy Mountains Authority provided for a commissioner and two associates. The law vested the decisive power in the commissioner. He was authorized to assign fields of managerial responsibility to his associates. In practice, it has been customary for the three to meet weekly on policy matters.

Despite the possibilities that are suggested in the foregoing examples the strength of the belief in the appropriateness of a board in conducting public enterprises was reflected in Paul H. Appleby's 1956 memorandum, entitled "re-examination of India's administrative system

with special reference to the government's industrial and commercial enterprises". Mr Appleby's own skepticism about the need for boards was implied in the terms in which he accepted their inevitability. "The convention", he wrote, "of having boards of directors for companies and corporations is so strong that it must be assumed that they will continue to be the level to which ministers and government will delegate all the authority the latter may be persuaded to extend."

Types of Directing Boards

We may now look at the types of directing boards from the standpoint of their membership. In this connection, of course, it is necessary to consider the different possibilities that exist, on the one hand, in wholly government-owned enterprises and, on the other hand, in mixed enterprises based upon the public and private ownership of shares.

As to wholly government owned undertakings, five main possibilities are open.

1. One type of board consists of persons who are selected as individuals. The law may indicate that certain kinds of prior experience are desirable. However, it is experience that is supposed to come without any strings of affiliation. Such is the type of board idealised in the pattern of the British statutory corporations. As an ideal for the composition of policy-shaping boards it is defensible in face of the fact that in practice some consultation with interests is likely to occur in the selection of members in terms of a concept of balance as well as an assemblage of able individuals.

2. A second type of board specifically provides for the representation of certain interests that are concerned in the work of the enterprise: the general public, through government representatives as such; the workers; the consumers. The outstanding application of this pattern since the Second World War has been in France; the other sole example in Europe seems to be the practice of Austria. Dr Hanson is probably right in echoing Professor Robson's conclusion that "in France, the initial attempt partially to 'insulate' the enterprises from parliamentary politics by establishing tripartite boards and a special quasi-judicial supervisory organ may be regarded as having broken down". Maurice Bye, in a recent study of *Nationalisation in France and Italy* edited by Mario Einaudi, said of the tripartite feature: "The experience of five years . . . has produced

a reaction not only against abuses of this formula but certain basic principles of the formula itself." Dr Adolf Sturmthal, in his discussion of "the structure of nationalised industries in France", published in the *Political Science Quarterly* for September 1952, observed that the tripartite composition of the board is a source of weakness because "it transfers bargaining and negotiation to a body which ought to be united in purpose and have a consistent policy".

I do not quarrel with the verdict that is shadowed in what I have quoted. Certainly there are inherent risks of deadlock or disintegrating responsibility when clashes of interest are built into the entrepreneurial structure at the very point where an integrative capacity for policy-making is supremely important. At the same time, one must admit that more is involved in the tripartite principle than "insulation". It is a phase of the unsolved problem of the participation of workers in the affairs of modern industrial establishments. For private enterprise, it is likely the solution in free societies lies in consultation and in collective bargaining which is conducted by strong unions, equipped with facts and having a sense of responsibility. So far as this is the solution for private enterprise, is it applicable to public enterprise? If not, what is the answer? Doubtless it must be considered in terms of the total system of incentives.

3. A third main type of board from the standpoint of membership consists of officials from different ministries or agencies of the government, or of representatives named by ministries or agencies. The emphasis in forming such a board is upon coordination. We have noted that Paul Appleby in his 1956 memorandum showed little enthusiasm for what he called "the convention of having boards of directors for companies and corporations". Admitting its strength as a convention, he went on to say: "In general, board membership should be confined to the Managing Director and (in the case of large enterprises) his two principal deputies and two high officials in other enterprises or in ministries normally having related, supervising or coordinating interests". Mr Appleby sought to clinch his point by adding: "In effect, the boards should be organs of governmental coordination, the members definitely empowered to speak for the respective ministries, and capable of judging which matters should, in spite of delegation, be referred to higher authority. The appointment of private persons should be generally avoided. Where desirable such persons with special qualifications should be used as special consultants or experts."

If board membership is to be shaped primarily for interagency coordinating purposes, I believe that Mr Appleby is right in stressing the point that those who come from the ministries should be officials in them, not outsiders named by them to act in their behalf. In Turkey (where the public sector is extensive and much thought has been given to it) one gets the strong impression of futility about persons who are named by the ministries or agencies to serve on the boards, without being truly connected with the ministry or agency that names them.

We should note, however, A.D. Gorwala's dissent from the idea of board membership as a mechanism of interagency coordination. In his *Report on the Efficient Conduct of State Enterprises*, prepared for the Planning Commission, he declared: "... since control and interference by the backdoor must be guarded against, there is no room for departmental representatives on such bodies". In somewhat similar vein and to the same end, Asok Chanda, the Comptroller and Auditor-General of India, thoughtfully discussed the problem of the relations of civil servants who are assigned to corporations. "It is not sufficient", he observed in his 1958 book on *Indian Administration*, "to enjoin that directions of government should be issued in writing to the corporations; it is more necessary to ensure that the officials in charge are not influenced by the views of their official superiors in the central ministries on whom their advancement largely depends. It is imperative that they should be placed beyond the pale of such direct or indirect influence; this can only be done if they were to retire and sever their connection with their present service."

In the case of mixed enterprises, several governmental agencies may own some of the publicly held shares. Two or more levels of government may be involved. The unavoidable result may bring into play some of the complications we have just discussed.

4. A fourth main type of board in respect to membership is composed of representatives of areas of service who are chosen by local governmental bodies. A successful example is the Metropolitan Water, Sewage and Drainage Board in New South Wales, Australia. The chairman and vice-chairman are named by the State government. The other members are chosen in five constituencies, within each of which are grouped a number of municipal units. Each of these groups of local bodies acts collectively in the choice of a representative on the board. In practice there has been a marked

degree of continuity under this system. In three cases, the same individuals have served for more than twenty years.

5. A possible fifth type of board consists of members who are drawn from the personnel of the enterprise. This arrangement may amount to the formal recognition of the " management team " as the directing body of the undertaking. Whether used in combination with other elements of membership or alone, this type of board has much in common with corporate tendencies generally. In public enterprises, it may act as a stimulus by offering board membership as a promotion goal. We shall return to this question later, after surveying the types of boards from the standpoint of the assignment of their members.

Use of Board Members

From the standpoint of the way in which the board members are used, three main alternatives are identifiable.

1. The members act as a group. They have no individual assignments to attend specially to phases of the work. This arrangement is often called the " policy " type board.

2. The members (although they deliberate and vote as a group) are assigned to particular phases of the enterprise. This arrangement is often called the " functional " type board.

3. The two principles may be combined. It may involve the use of some full-time " functional " members and some part-time " policy " members. All of them, of course, join in the group discussions of policy.

Much can be said in favour of each type. In general the first alternative is in line with the stress upon the board's role in providing a forum for what we have called integral policy-making and in providing a basis for an integrated management. Yet it must be admitted that realism in policy discussions may be greater when each of the members, as virtual sub-committees of one, brings to bear the benefit of a close acquaintance with some major aspect of the undertaking.

The shifts in the make-up of the British Coal Board provide an interesting case study of progresssion through the different types. At the outset, the board was fully " functional ". Then, under the 1949 amendment to the law, the board was made preponderantly " policy " in type. Later, a second change threw the weight on the " functional " side. Six full-time members have individual assignments; they are supplemented by four part-time members of the

" policy " type, who serve only when the board is reaching decision as a group.

VI

It is hazardous to recommend a single preferred form of board among the alternatives that have been surveyed. The risks in such a choice are not those of my ignorance only ; they are inherent in the diversity of purposes and conditions in the conduct of public enterprises. Nevertheless, all things considered, I believe that in many circumstances the best kind of board would consist of the following elements: an appointed chairman, whose position ordinarily would combine the role of general manager ; several of the chief functional executives of the undertaking, constituted as board members on the chairman's nomination ; and several persons of varied experience and mature judgment from the outside, named to serve as board members on a part-time basis and without special assignments.

The emphasis properly falls upon vigorous, imaginative, and orderly management within the enterprise. The internal structure should not be stereotyped. In some cases the posts of chairman and of general manager may be separate, despite the ambiguities of responsibility that sometimes attend such a separation. If there is to be energy, care must be taken to keep to the minimum the matters that require formal action by the whole board, whether on expenditures above a certain amount or appointments above a certain level of compensation. The items of this sort that must have the specific concurrence of the government should be even more limited. The essentials of policy are investment, pricing, and labour standards.

As for overall guidance in these matters, I have said enough in earlier pages to show that I am in sympathy with the tendency since the twenties, illustrated in England, Australia, and elsewhere, to give statutory recognition to the need for governmental reserve powers where considerations of national development are at stake. So far as possible, the policies should be embodied in the initial financial framework ; subsequent investment decisions, when necessary, should be handled in the larger context of developmental planning and the capital budgetary process. In other matters it is difficult to be precise about the occasions and limits of ministerial intervention in the affairs of public enterprises. As a result, some observers sound the warning that a dangerous zone of irresponsibility may develop since ministers may influence the behaviour of the enterprises by

informal methods and do not stand publicly responsible in the absence of written instructions. In coping with this situation, it is a wise counsel that the enterprise should reduce to writing and confirm with the appropriate minister or other officer the exact sense of any legitimate instruction that has been received, no matter how informally it may have been conveyed. This practice can be made more than a mutual safeguard. Pursued in self-respect and with goodwill, it can help to clarify the respective claims of coordination and entrepreneurial autonomy.

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